SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 58

City of Owensboro, ... Appellant

v.

Owensboro Water Works Co., . . Appellee

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF AND ARGUMENT FOR APPELLANT

STATEMENT.

The Owensboro Water Co., the so called "predecessor" and "assignor" of the appellee, the Owensboro Water Works Co., was organized September 9, 1878, under the general laws of the state of Kentucky, authorizing persons to associate themselves for carrying on business and to file articles in the county clerk's office of the county court where such business was to be carried on. Acts

1869, pp. 70-94, Gen. Stats. Chap. 56. The capital stock was fixed at $80,000. The object of the corporation was to construct at Owensboro a water plant, with pumping station, machinery, pipes, etc., for supplying the city and the inhabitants of the city with water from the Ohio river. The original cost of the plant was about $40,000. Subsequent additions were made costing about $30,000 and since then from time to time other additions have been made which have probably increased the cost of the property used and employed in the service to approximately $105,000.

An ordinance was passed by the City of Owensboro and accepted by the water company September 10, 1878, (Record pp. 30 to 35), whereby the company was authorized to lay its pipes and mains in the streets of the city; the city also agreeing to rent a number of hydrants at certain specified prices. This contract for hydrant rental was to run twenty-five years, the whole life of the company, and expires September 10, 1903. It is not in any way involved in this suit.

October 1, 1878, the company made a mortgage on all its property to secure the payment of bonds amounting to $50,000, payable twenty-five years after date.

Again October 1, 1884, the company made another mortgage on its property to secure the payment of one hundred bonds of $1,000 each, payable twenty-five years after date. It is alleged that of all the money realized on the stock and bonds, no more than $105,000 was delivered to or expended by the corporation.

2. The Owensboro Water Works Co., the appellee, was organized May 30, 1889, under the Gen. Stats. Ch. 56. This company was organized to acquire the franchise, property and con-

tracts and carry on the business of the Owensboro Water Co. Its capital stock was fixed at not less than $300,000 and not exceeding $500,000. The stock issued now amounts to $355,000. The property of the old company was conveyed June 10, 1889, to the new company for the recited consideration of $295,000 of stock and $200,000 of the first mortgage bonds of the new company. The stockholders of the two companies being practically the same

July 1, 1889, a mortgage was made by the present company for $250,000. All these bonds except $237,000 have been paid. There is a floating debt also of $20,000, making the total debt of the company $257,000.

The water system is inadequate and insufficient; its pipes are too small, its intake is in an eddy and the water unwholesome, and is not filtered; there is no standpipe or reservoir; the mains are not flushed and they become foul with mud and decaying matter; adequate fire protection is not afforded. The company has no uniform rates, they are arbitrary and unjust.

The income of the company is between $29,000 and $32,000 per annum; that the cost of operating the plant for the year 1890 was $5,771; for 1888, $6,210.20; for 1897, $4,208.20; that the annual depreciation does not exceed $2,500; that the whole of its taxes for 1899 was $2,220. It is alleged that the rates prescribed by the ordinance will produce $17,000 to $18,000 per annum aside from $7,400 paid by the city for hydrant rentals, a total of $25,000.

In 1895 the common council went into an investigation for the purpose of fixing rates, but the company's officers, especially its president, Callahan, refused to give the city authorities any facts or furnish any information that would enable the city to fix

fair rates. The ordinance complained of was introduced in the council and given its first passage March 12, 1900, by the committee appointed to investigate and prepare an ordinance fixing rates; it was published and commented on in the city newspapers, was known to the company but it sought no hearing and failed or refused to appear or offer any reasons against the passage of it. The rates prescribed by the ordinance are just and fair and will enable the company to pay operating expenses, taxes, wear and tear and leave a net income of about $13,000. The value of all the company's property is not greater than $90,000. The mortgage debts are fraudulent and void. The water company is a practical monopoly; it is the only water company in the city.

The ordinance prescribing rates was finally passed by the common council and approved by the mayor, March 21, 1901, and is published in the record pp. 31 to 35.

The answer traverses all the material allegations of the bill and then it sets out the organization of the Owensboro Water Company, the alleged assignor of the appellee and gives a succient history of its organization, the amount of its stock, mortgage debt, value of its property, franchises, etc., its income and cost of operation in detail. The amount that can be realized under the ordinance from sale of water, the value of the property, etc., of the company, cost of operation and alleges that a net income of $17,000 will remain, or about seventeen per cent. on the value of the property employed in the service.

It is claimed by appellee that by section 9 and 10 of the ordinance of September 10, 1878, the water company had the right to establish rules, fix rates and regulate the mode and manner

in which private consumers of water should pay their water rents. That the purchase by the appellee of the Owensboro Water Company was assented to by the City of Owensboro, by the ordinance of June 3, 1889, Record pp. 25, 29. That the rates of charges prescribed in and by the ordinance of March 21, 1900 are so low as to destroy appellee's property, and that the city had not for that reason power to enact it. That its annual income under the ordinance would not amount to as much as $17,000. It is not mentioned in the bill that it has an annual income from the city under the contract for hydrant rentals, which is unaffected by the ordinance, of $7,400 additional.

It is contended by appellant that the gross annual income of the appellee is approximately $30,000, of which $7,400 is paid by the city for hydrant rent, and the remainder, $22,600, by private consumers of water; that its annual expense of operation is approximately $6,000, taxes $2,500, and its annual depreciation of wear and tear, if this is to be estimated, is not exceeding $2,000 to $2,500. That the reduction made by the ordinance cannot exceed thirty per cent. of its income from private consumers, say $6,780 and that a net income of approximately $13,000 will annually remain, or twelve to thirteen per cent. on the value of the property employed in the service. That the fair value of appellee's whole property is approximately $90.000 to $100,000.

And that the supply of water is inadequate; that the water is unfiltered, there being no reservoir, stand-pipe or other mode of settling or filtering it; that it is unhealthy, the pipes and mains are never flushed; that the value of the service rendered is as little as possible; that the rates charged are arbitrary and exorbitant.

The charter of appellee is printed in Record, pp. 28-30.

The general law of the state of Kentucky under which the charter was obtained is printed at the foot of this brief as "Appendix A."

The General Reservation Law of the state, enacted February 14, 1856, and in force since that time, is printed at the foot of the brief as "Appendix B."

The Assignment of Errors is printed in Record pp. 389-394. It is alleged that the court below erred to the prejudice of appellant as follows:

> "First: Because the complainant's bill does not state a cause of action and on complainant's own showing it was not entitled to the relief prayed for or to any relief. And the demurrer thereto should have been sustained.
>
> Second: Because the court erred in holding and adjudging that the City of Owensboro had not power and authority under its charter, that is under the act of the legislature and the Commonwealth of Kentucky of June 14, 1895, being the charter of cities of the third class, and under the laws of the Commonwealth, to fix and regulate the prices to be charged by the complainant for water furnished by it to private consumers in the City of Owensboro.
>
> Third: Because the court erred in holding and adjudging that the City of Owensboro had not power and authority under its said charter, the said act of June 14, 1893, of the legislature of the Commonwealth of Kentucky, and the laws of the state to enact the ordinance, entitled, 'An ordinance to fix and regulate prices and charges for water furnished consumers and for other purposes,' of date March 19, 1900.

Fourth: Because the bill of the complainant does not state facts or show that the rates and prices for water prescribed and fixed by the ordinance entitled, 'An ordinance to fix and regulate prices and charges for water furnished consumers and for other purposes,' of date March 19, 1900, were unjust or unreasonable or contrary to law.

Fifth: Because upon the whole record and upon the evidence in the record, it is shown that the maximum rates and prices prescribed by said ordinance are reasonable and just rates. That under the rates and prices fixed by said ordinance complainant can earn and collect enough money to defray all legitimate expense of operating its plant, its taxes, and repairs and pay a fair and reasonable dividend on the value of its property employed in the service.

Sixth: Because the court erred in enjoining the city from enforcing the whole ordinance, especially the fifth section and the sixth sectiou thereof; that is to say, though the court might have been of opinion that the rates prescribed by the ordinance were unjust or too low, yet it erred in enjoining the enforcement of the fifth section which was passed for the protection of the public health. And also erred in enjoining the sixth section which was intended to compel the complainant to furnish the city facts which would enable it to fix just rates.

Seventh: Because the court erred in adjudging and decreeing that the City of Owensboro refrain from attempting to prescribe rules or regulations with respect to water rents or the mode of collecting same and from interfering in any way—the complainant's rules and regulations with respect to the collection of water rents from private consumers or prices to be charged and from in any way interfering with the complainant in its rules and regulations, and the water rates fixed by itself and its private consumers and customers.

Eighth: Because the court erred in decreeing in effect that the City of Owensboro should not in the exercise of the general police powers enact any ordinance for the protection of the public health or the preservation of property or the public convenience, or the preservation of the streets, that would affect the complainant, or to pass any ordinance for the protection of the public that would affect the complainant.

Ninth: Because the decree is contrary to law, and is not supported by the evidence and is contrary to the evidence, and goes beyond the issues formed.

Tenth: Because on the pleadings and evidence in the record the complainant's bill and suit should have been dismissed and judgment rendered in favor of the city for costs."

ARGUMENT.

I. The complainant's bill is a long, discursive document containing much repetition, stating matters in a most general way and omitting many material facts necessarily within its knowledge and essential to be considered by the court in determining the primary and most important question involved, namely, whether the rates prescribed by the ordinance passed by the common council of the City of Owensboro, March 21, 1900, are just rates or not.

(*a*) The bill fails to allege the *present value* of the complainant's property or the *original cost* thereof. No statement is given of what the property consists of, or its character or condition, the amount of its real estate and the condition of the

buildings thereon, the number of its engines, pumps and pipe connections, its street mains, the extent of its pipe system, the size of the pipe, its hydrants, valves, etc.

(*b*) The amount of the capital stock of the company is not given, nor is it stated whether the stock actually represents money or property paid into the corporation or conveyed or delivered to it at a fair value.

(*c*) The amount of the bonded debt of the company is not stated, or the annual interest thereon and whether this bonded debt was created for the benefit of the corporation; that is, whether the money realized on these bonds went into the corporation or not; nor is the amount of any other indebtedness stated, or for what purpose such indebtedness was created.

(*d*) No statement is made in the bill except in a very general way and inferentially of the annual cost or expense of operating the water works plant or system. The amount paid out for salaries to officers, if any, of wages to engineers, and other employees, cost of coal, annual taxes, etc., is not alleged. Such cost and expense should have been alleged in detail. It is stated only in a general way that the annual necessary expense of operation is over $13,000.

(*e*) The annual gross income of the company and the sources of it, that is, the amount collected from the defendant city for hydrant rentals under its contract with the city, the amount charged for water delivered to private consumers and the amount annually collected therefor, and the amount annually uncollected, is not stated.

(*f*) It does not state any facts or give any basis upon which an estimate can be made of the actual annual depreciation of

the plant, but states generally that the natural wear and tear subjects it to an annual expense of not less than $4,000.

(*g*) There is no allegation of facts which will enable the court to determine *the value of the service rendered* by the company to the public.

All these facts are material and should have been alleged so that the court might determine on the face of the bill whether the rates fixed by the ordinance were reasonable, and to lay a proper and sufficient foundation for the introduction of evidence. In every system of procedure, allegations not supported by evidence and evidence offered without allegation of the fact are equally ineffectual. If the complainant's bill is insufficient, that is, fails to state fully the facts which show the complainant entitled to an injunction, it should be denied, though the complainant's evidence would warrant the granting of an injunction. On a motion for a preliminary injunction, the case, with its ground for relief, must be stated by the bill itself, and the scope of the bill cannot be enlarged by the evidence: Leo v. U. P. Railway Co., 17 Fed. 273; Type Foundry v. Carter & Gibson, 31 Fed, 524; 4 McLean, 272; 20 Fed. 545: Foster's Fed. Prac. secs. 232, 233.

And of course unless the foundation is laid in the bill itself for the evidence that may be offered by the complainant, he is not entitled to the relief sought though the evidence might warrant the relief. But it is contended not only that the bill contains no ground for equitable relief, but that the evidence presented by the complainant is likewise insufficient.

II. Pursuant to section 156 of the present Constitution of Kentucky, the General Assembly, by an act approved Septem-

ber 30, 1892, Ky. Stats. sec. 2740, classified the cities of the state placing the cities of Owensboro, Bowling Green, Henderson, Paducah and Frankfort in the third class.

Afterwards, by an act approved June 14, 1893, Ky. Stats. secs. 3236 and 3440, the General Assembly passed a general law for the government of cities of the third class, and this is the statute under which cities of this class are now governed in the state of Kentucky.

By section 3256 it is declared that "This act shall be a public act and be judicially noticed and liberally construed by the courts and all previous charters of the cities embraced herein, and all amendments thereto are hereby repealed." But by sec. 3258 all vested rights under previous charters are protected and saved.

It will be observed upon an examination of the provisions of this charter of cities of the third class that very full powers are conferred for the purposes of local government. It will be necessary for the court to especially examine several parts of it, among others the following :

"Sec. 3290. The common council of each of said cities shall within the limitations of the constitution of the state and this act have power by ordinance : * * *

5. To provide the city and the inhabitants thereof with water, light, power, heat and telephone service, by contract, or by works of its own, located either within or beyond the boundaries of the city. To make regulations for the management thereof, and to fix and regulate the prices to private consumers and customers."

Sec. 3426 authorizes the common council to establish a board of public works for the city. This, however, has never been done in Owensboro. "When no board of public works has been established the duties herein imposed shall be performed by the common council, and such other employes and agents as said common council may elect or designate."

"Sec. 3438. The board of public works shall have the exclusive power and control over the construction, supervision, cleaning, sprinkling, repairing, grading and improving of all streets, alleys, avenues, lanes, public cemeteries, parks, squares, fountains, wharves and landings, market-houses and places, bridges, sewers, drains, ditches, culverts, streams, canals and water courses, sidewalks, curbing, and the lighting of all such public places as may be deemed necessary within the corporation; to fix and establish the grades of all streets, alleys, avenues and thoroughfares; they also have the power, supervision and control over the construction, repairing, cleaning, lighting and heating of all public buildings, and over all public improvements of the city. They shall have exclusive power to make all improvements and expenditures, within the revenue limits allowed by the council, which shall cost less than five hundred dollars, but shall let all contracts over fifty dollars to the lowest responsible bidder after due advertising. *The said board shall have the exclusive power to organize and control* the fire department, the workhouse, the hospital, the alms-house, the city prison, and *such works as the city may own for supplying the city or the inhabitants thereof with water, light, heat or power.*"

* * * * * * *

Three things are authorized by the above quoted sub-section 5 of section 3290, namely :

(1) To provide the city and the inhabitants thereof with water service, light service, etc.

(2) To make regulations for the management thereof ; that is, to make regulations for the management of the water service, light service, etc.

(3) To fix and regulate the prices to private consumers and customers. That is, to fix and regulate the prices for the water service, light service, etc., rendered to private consumers and customers.

The first clause of this sub-section grants power to provide the city and its inhabitants with water and light service. The city may do this by works of its own and it may also do it or have it done by contract with some other corporation or person. It is not perceivable how the water and light service can be provided for the city and its inhabitants except by one or the other of these two modes. If the city does not provide this service by works of its own, it cannot provide or procure the service otherwise than by contract with some other corporation or person. Water works and gas works cannot be built in the city, and the pipes and mains laid in the streets and public places without a grant from the city. Sub-section 35 of section 3290, Kentucky statutes.

The second clause or sentence of sub-section 5 while it relates to the general subject and the objects mentioned in the first clause, confers separate and distinct powers upon the common council, namely, power to regulate the management "thereof," and "to fix and regulate the prices to private con-

sumers and customers." The word *thereof* plainly has reference to the object which the city was authorized by the first clause to provide, that is, water service, light service, etc., and to fix and regulate the prices to private consumers and customers thereof. The legislature cannot be supposed to have done the useless thing of authorizing the city to fix the price of water and light to private consumers furnished from its own works. That power it would necessarily possess if it had power to furnish water or light. The power to manage and control *works of its own* is given in very broad and explicit terms by section 3438 above quoted, and it cannot be supposed that the legislature intended to *twice* grant to the municipality the same power to manage works of its own. From this fact, as well as from the terms used in the grant, it seems obvious the legislature meant to empower the cities to manage the operation of such works as they might own by section 3438, and by sub-section 5, of section 3290, to fix and regulate prices of works not owned by them but by private corporations. Effect ought to be given to all parts of the charter, and no part of it held nugatory.

The court will take judicial notice of the fact that at the time of the passage of this act for the government of cities of the third class, some of them owned water plants, gas plants and electric light plants. For example, the city of Henderson at that time owned its gas, electric light and water plant, the plants being the property of the municipality, and Bowling Green owned its own water works plant. The City of Owensboro, on the other hand, did not then own either a water plant, gas plant, or an electric light plant, though it now owns an electric light plant. Some of the other cities of the third class own

their own plants, while others do not, for supplying light and water.

The legislature, therefore, was providing in the charter for both conditions, that is, for conditions existing in those cities that owned their own plants, and also for conditions existing in those that did not. It is perfectly obvious that sec. 3438, *supra*, provides for the management and control of those works for supplying water, light, etc., which are owned by the municipalities, while sub-section 5 was intended to empower such municipalities as did not own their own plants to provide the city and the inhabitants thereof with water and light, either by works of its own, or by contract, as it might deem best under the circumstances in which the city found itself, and then the power was conferred to make such regulations, that is, police regulations for the management thereof as the public health, public convenience, etc., might require, and also to fix and regulate the prices to be charged by the owners of such works for the rendition of such service to private consumers and customers.

At the time of the passage of the charter for cities of the third class in Kentucky the City of Owensboro had a contract with the appellee to furnish water for the extinguishment of fires, and hydrants for that purpose are placed at the designated points about the city. The rental for these hydrants amounts annually to $7,400, payable quarterly. This service is rendered to the municipality as such and is paid for out of the city treasury. Similar contracts then existed and still exist at Paducah and Frankfort.

The appellee is the only water company at Owensboro, and it has not only a virtual, but by reason of that fact, an absolute

monopoly of the business of supplying water for public and private use in the city. The same state of fact exists at Paducah and Frankfort. The power to regulate the management of water service and to fix and regulate prices to private consumers and customers was conferred for the protection of the public and to prevent injustice, oppression and extortion.

This legislation creates and establishes no new principle of law, but gives effect and application to an old one. The power of restraining monopoly and regulating the prices and charges or exactions that might be made or taken by those having a monopoly, whether such monopoly was created by a grant from the King or by force of circumstances, where the businesss is affected with a public interest, existed by the common law of England, which, together with all statutes of Parliament made in aid of the common law prior to the fourth year of King James I, and which are of a general nature and not local to the kingdom, was adopted by an ordinance of Virginia in May, 1876 (Hening's Statutes at Large, vol. 9, p. 127.) And that ordinance has been substantially embodied in every constitution adopted by the state of Kentucky. This principal of the common law is illustrated by the declaration of Lord Hale, as follows :

> " If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen . . . . . *or because there is no other wharf in that port*, as it may fall out where a port is newly erected ; in that case *there cannot be taken arbitrary*

and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences *are affected with a public interest, and they cease to be juris privati only.*"

See also the opinions of Lord Kenyon in Bolt v. Stennett, 8 T. R. 608, and of Lord Ellenbrough in Allnutt v. Inglis, 12 of Easts Reports, 538, 539, and of Chief Justice Waite in Munn v. Illinois, 95 U. S. 123, 136; and Nash v. Page, 80 Ky. 539.

The power is traceable back to the general principles of the common law, brought to this country by our ancestors and expressly declared or adopted by the state of Virginia, which then included not only Kentucky, but the great northwest territory, and subsequently embodied in the organic law of the state of Kentucky. The power of regulating the conduct of the business and fixing the prices to be charged for services rendered exists, therefore, *in all cases where there is a monopoly by grant or circumstances and* [*or*] *where property is so employed as to be affected with a public interest.* Munn v. Illinois, 94 U. S. 113; Spring Valley Water Works, v. Schottler, 110 U. S. 348, 353, 354.

Such is the law of the state of Kentucky and the source of it, and intimation of doubt by the court below of the constitutional power of the legislature of the state to delegate authority to the municipality to enact the ordinance, was matter of surprise. The power to enact the law, for the ordinance is a law, must be either exercised by the legislature of the

state in the first instance, or it must delegate a portion of its legislative power for that purpose to the municipality, or to some board or tribunal. The power of the legislature to delegate to the municipal legislature a sufficient part of the legislative power of the state to enact the ordinance and all other needful local laws, cannot be doubted. Dillon on Mun. Corp. (4 ed), sec. 308; Lord Abinger's opinion in Hopkins v. Swansea, 4 M. and W., 621, 640; Des Moines Gas Co. v. City of Des Moines. 44 Iowa, 505, S. C. 24 Am. Rep. 758; Taylor v. Carondelet, 22, Mo. 105; 17 Am. and Eng. Ency. Law, 230, Horr & Bemis Pub. Ordinances, sec. 2; Milne v. Davidson, 5 Martin 409, 16 Am. Decs. 189; and Murphy v. Louisville, 9 Bush 196-7. In the case cited Judge Pryor says:

> "A public corporation is subject to the control of the government from which it derives its existence, and is in fact a part of the government itself, created for the purpose of aiding in sustaining and enforcing the rules, regulations, and laws so indispensible to every municipal government. These corporations are created for public purposes, and may be abolished or altered at the will and pleasure of the power creating them. The charter creating the present corporation (the city of Louisville) vests the legislative departments of the city government with the power to enact laws for the purpose of promoting the welfare and advancing the interests of those living within its corporate limits. These laws, when in accordance with the city charter, and not in conflict with the state or Federal constitutions, are to be respected and obeyed by all those subject to the municipal government. The laws or ordinance are made public, and apply to all within the boundary of the corporation."

III. Power to make all necessary police regulations for the security and protection of the general health, comfort, convenience, morals and safety of the public and to define, declare, prevent and suppress and remove nuisances within the city is conferred in the broadest terms by several provisions in sec. 3290, especially sub-section 16, Ky. Stats.

Regulation is a subject together with the fixing of prices for services rendered by public utilities that has occupied the attention of possibly every legislature of every state in the union for the last twenty or thirty years; certainly since the decision of the Supreme Court in the Munn case and other cases of a similar character reported in 94 U. S. Fixing freight rates and especially the price to be paid by private consumers of water and light, is now authorized by the laws of probably every state in the Union. The statutes authorizing such regulation and conferring powers to that end upon boards and other tribunals, and upon the governing bodies of municipalities, are remedial in their nature, enacted for the security and protection of the general public, and should receive a liberal construction by the judicial tribunals.

They ought not to be confined in their operation and effect to the strict letter, but extended and applied to all cases within their purview and spirit.

Railroad companies, turnpike companies, street car companies, water companies, gas companies, electric light companies, public warehouse companies, etc., are all public utilities in which the owners have embarked their money and property in occupations "affected with a public interest," whereby "it ceases to be *juris privati* only." Such corporations perform functions and duties which are public in their nature and char-

acter and belong to the state; duties which the state might primarily perform for the public. They have conferred upon them the privilege of exercising the power of eminent domain. Corporations organized for the purpose of conducting any business above mentioned, are not private corporations, but are *quasi* public corporations and their officers are consequently *quasi* public functionaries. The property they own and use in conducting the business is in a just sense held in trust for the benefit of the public. ALL THAT SUCH CORPORATIONS HAVE A RIGHT TO EXACT FROM THE PUBLIC FOR THE SERVICES RENDERED IS THE LEGITIMATE AND NECESSARY EXPENSE OF OPERATION AND A MODERATE RETURN UPON THE FAIR VALUE OF THE PROPERTY EMPLOYED BY THEM IN THE PUBLIC SERVICE. In so far as the shares of stock issued actually represent money or property put into the corporation at a fair valuation, they are valid. If any stock has been issued otherwise, it is as to the public, without warrant of law, fraudulent and void. If mortgages have been made and bonds have been issued and distributed among the stockholders or sold and the money divided among them, the same not going into the corporation, such transactions are in violation of the trust, are an abuse of the power to create indebtedness, and the mortgage and the bonds are also fraudlent and void as to the public. See Judge Black's argument before the Pennsylvania Senate, published in the "World's Best Orations," edited by Justice Brewer, vol. 2, pp. 471, 480; Beach on Pub. Corps, Secs. 2 and 3; Miners Ditch Co. v. Zullerbach, 37 Cal. 543; Munn v. Illinois, 94 U. S. 113; Smyth v. Ames, 166 U. S. 544.

This is sound doctrine and the just rule to be applied as be-

tween the public and such corporations, or as between the public and the holders of such stock or such bonds, however it may be as between the corporation and the holders of such stock or bonds. This principle has been very fully recognized and applied. For example, Judge Clark said in his opinion in the case of the New Memphis Gas and Light Co. v. the City of Memphis, 72 Fed. 955, in considering the question of whether certain rates prescribed by the local authorities were just, and in discussing the elements to be considered in fixing such rates:

> "The company has a right to such gross income from the sale of gas as will enable it to pay all legitimate operating expenses, pay interest on valid fixed charges, *so far as bonds and securities represent an expenditure actually made in good faith*, and also pay a reasonable dividend on stock, *so far as this represents an actual investment in the enterprise.*"

And the same rule was announced by Judge Woolson in considering the reasonableness of rates in the Capital City Gas Light Co. v. City of Des Moines, 72 Fed. Rep. pp. 842, 823, 846.

In Smyth v. Ames, 169 U. S. 544, Justice Harlan in delivering the opinion of the court, said:

> "If a railroad company has bonded it property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the

purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged."

And the same judge delivering the opinion of the court in the Covington Turnpike Co. v. Sanford, 164 U. S. 597, discussing the question as whether the rates prescribed were reasonable, said:

"That the inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise."

In San Diego Land Co. v. National City, 174 U. S. 757, the court said:

"The basis of calculation suggested by the appellant is however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, *is a fair return upon the reasonable value of the property at the time it is being used for the public.* The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which

went into the plant may be in excess of the real value of the property."

Many other cases might be cited recognizing the principles here contended for, namely, that only the fair and legitimate expenses of operation and a reasonable return upon the actual value of the property employed in the service and the nature or value of the service should be considered in fixing rates of charges for services rendered by these public corporations. This rule necessarily excludes from consideration such stock and such bonds as have been issued not representing money or property actually paid into or received by the corporation.

We think it may safely be asserted that no court, in a contest between the public and such a public or *quasi* public corporation, has ever given any recognition to such stock or such bonds. After a diligent search no such case has been found, and we presume none can be, because, if recognition were given to such stocks and bonds, it would utterly defeat all attempts by the authorities to regulate prices to be charged for service rendered to the public. It would enable the corporations to pile up such a mountain of fictitious stock and debt as would render extortion necessary and legitimate.

Persons proposing to organize corporations for operating water companies, gas or electric light companies, or street car companies, go into some thrifty town or city. They obtain the necessary consent of the municipal authorities. They expend fifty or a hundred thousand dollars, and erect their plant and put it into operation. By force of circumstances they have a

monopoly in the town as complete as if the grant were exclusive. Two such concerns cannot live in the community. Soon it is discovered they have a gross income sufficient to pay operating expenses, taxes, etc., and have left a sum equivalent to interest at the rate of four, five or six per cent. on three or four times the actual cost of the plant. Then various schemes are adopted. Sometimes the stock is increased and taken pro rata by the original stockholders and sold ; sometimes mortgages are made and bonds issued and divided among the stockholders and these bonds sold, the stockholders and not the corporation realizing the money for the stock or bonds. In order to pay dividends on this stock or pay interest on the bonds and create a sinking fund, rates and charges for the service are kept at the highest point. If the exhorbitant rates are not paid, the water or gas or electric light or telephone is " cut off." The scheme described is common to the whole country. It is nothing more or less than a fraud on the public. Instead of issuing stock or bonds, representing not money paid into the corporation but put into the pockets of the corporators, the rates or prices for the service rendered ought to be reduced. These companies have no warrant of law for issuing any stock except for money paid in or properly delivered to the corporation at a fair valuation. Under the power to create or contract indebtedness no power exists for executing a mortgage and issuing bonds for the purpose of enriching the stockholders. Such stock and bonds are void into whosoever hands they may come, because not authorized by the charter, and because prohibited by general principles of justice and law. The fact that such documents may be made negotiable in form does not protect them, " for it is to be kept in

mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued." "And this applies to every person who takes the paper afterwards." The Floyd Acceptances, 7 Wallace, 676.

There are but two remedies for these wrongs known to the law: Regulation or municipal ownership. The first is difficult. These schemes are not usually executed by bunglers, but by skillful persons "learned in the law." The general outline only has been mentioned. All details are worked out with the greatest care and skill. All the elements of contract are employed. Sometimes, for example, as in the present case a new corporation is organized by the stockholders, and the property "sold" and "conveyed" by the "old" to the "new" corporation, for a large consideration in stock and bonds. Nothing on the face of the papers could have a greater appearance of honesty and fair dealing. Are not such schemes unlawful and void; and is not *this* scheme void? The Owensboro Water Company, appellee's "predecessor" and "assignor," was organized September 10, 1878, for a period of twenty-five years under chapter 56, Gen. Stats. Ky. It built a plant for furnishing water to the city and the inhabitants. It entered into a contract with the city for the rental of hydrants and operated its plant until May 30, 1889, when the same persons who owned the stock in the old company, with others, organized the appellee, the Owensboro Water Works Company, and then the property, franchises, contracts, etc., of the old company were sold and conveyed to the appellee for $295,000.00 in stock and $200,000.00 in bonds delivered by the latter to the former.

There was no law of the state authorizing such a transaction as this—no law authorizing any *quasi* public corporation to sell, assign or transfer its franchises or property.

Noyes, on Intercorporate Relations, says:

"Sec. 135. It is a rule applicable to all corporations exercising public franchises that such franchises can be transferred only by and with the consent of the state which granted them—that corporate franchises are incommunicable without legislative authority.

The courts have assigned various reasons for the existence of the rule, of which the following are based upon principles fundamentally sound:

1. The charter of a corporation is the measure of its powers. Unless authority to transfer its franchises is expressly granted, such an act is *ultra vires.*

2. The transfer by a corporation of its franchises—disabling it from the performance of its public duties—is *against public policy.*

3. A corporation exercising public franchise is an agent of the state, and, without the consent of the state, cannot *delegate its powers.*"

Citing many cases, among them,

Railroad Co. v. Winans, 17 Howard, 30;

Central Transfer Co. v. Pullman Car Co., 139 U. S 24;

L. & N. R. R. Co. v. Kentucky, 161 U. S. 692;

Brunswick Gas Light Co. v. United Gas Co., 85 Maine, 532, 35 Am. St. Rep. 385;

Oregon Ry. v. Oregonian Ry., 130 U. S. 1;

R. R. Co. v. Hooper, 160 U. S. 524;

Beach on Corp. Vol. 2, Secs. 831-856;

If contrary to public policy, if *ultra vires*, if void, no recognition by the city could impart validity to it.

There is always great difficulty in presenting the real facts to the court. Attempts at regulation are always assailed as populistic or agrarian in spirit. Possibly such motives sometimes operate on the minds of boards, tribunals, or bodies empowered to fix rates, but doubtless they more often do not. Nothing is better known to men of average intelligence than that there exists nowhere in the state power to deprive any person of property without compensation and without due process of law. An effort to accomplish such a purpose would inevitably prove utterly futile. It would be contrary alike to justice and the law of the land.

The just and true rule to be applied in this case, and all similar cases, the rule supported by reason and by the decisions of this court is simply this: *The rates should be so adjusted as to enable the company to pay, all its legitimate operating expenses; and yield a fair return to the owners on the just value of the property employed in the public service.* We repeat, on the just value of the property embarked in the business; nothing on fictitious capitalization: whether represented by stocks or bonds.

This is the whole extent of the right of these corporations, and it is conceded. They are public or *quasi* public corporations. Their property is affected with a public interest. They are performing public functions. They have a right to charge for services rendered just compensation. But the public to whom the service is rendered also have rights of property which are as much entitled to protection and are as sacred as theirs. Every dollar

extorted from the people for services rendered in excess of what may be charged under the rule above stated is just so much of their money "taken" without just compensation, that is, without the equivalent in services rendered and is therefore under the form and pretense of law and right mere spoliation.

The Fourteenth Amendment granting the equal protection of the laws and prohibiting the deprivation of property without due process of law is invoked for *their* protection.

In Regan v. Farmers' Loan and Trust Co., 154 U. S. 399, this court said:

> "The equal protection of the laws which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking and destruction of private property, legally acquired and legally held."

In Smyth v. Ames, 169 U. S. 466, the court said:

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public con-

venience. ON THE OTHER HAND, WHAT THE PUBLIC IS ENTITLED TO DEMAND IS THAT NO MORE BE EXACTED FROM IT FOR THE USE OF THE PUBLIC HIGHWAY THAN THE SERVICES RENDERED BY IT ARE REASONABLY WORTH."

And in Covington Turnpike Company v. Sandford, 164 U. S. 596-7, this court said:

"When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. * * * * *

The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable, is an element in the general inquiry whether the rates

established by law are unjust and unreasonable. That inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise."

IV. We have attempted to show to the court, that there was and is ample legisative power to pass the ordinance fixing maximum prices and charges for water furnished to private consumers in the City of Owensboro. If, however, there was not such power, then it is contended that the court below on the authority of the decision of this court in the case of the Hamilton Gaslight and Coke Co. v. Hamilton City, 146 U. S. 265, and the authorities cited by the court, should have dismissed the case. A brief quotation is made from the opinion of the court in that case, as follows:

"The plaintiff's first contention is that there is no statute of Ohio authorizing any city, in which there are already gas works in full and complete operation, to erect gas works, or to levy a tax for that purpose. It this were conceded, we should feel obliged—the plaintiff and defendant both being corporations of Ohio—to reverse the judgment, and remand the cause with directions to dismiss the suit for want of jurisdiction in the circuit court. The jurisdiction of that court can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an

ordinance to which the state has not, in any form, given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts. Murray v. Charleston, 96 U. S. 332, 440; Williams v. Bruffy, 96 U. S. 173, 183; Lehigh Water Co. v. Easton, 121 U. S. 388, 392; N. O. Water Works v. Louisiana Sugar Co., 125 U. S. 18, 31, 38. A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States."

V. The appellee contends that there exists a contract between it and the City of Owensboro whereby the city is precluded from fixing rates of compensation for water furnished to private consumers thereof. This claim of contract is based upon the following sections of the ordinance of September 10, 1878, to-wit:

"Sec. 9. The said company shall have the power and authority to make and enforce as part of the condition upon which it will supply water to its customers, all needful rules and regulations, not inconsistent with the law or the provisions of this ordinance.

Sec. 10. The said city will adopt and enforce ordinances protecting the said company in the safe and unmolested exercise of these franchises, and against fraud and imposition, and against injury to the hydrants rented by it to said city, and against waste of water by consumers."

It seems obvious that no contract exists by virtue of these sections. There is no evidence in the sections above quoted of any intention on the part of the municipality to surrender the power to fix rates for the price of water. The language used is very general, and it is plain that rates for water was not included or intended to be included by the words used. No reference was made to the subject even in the most remote way.

In Stone v. Farmers' Loan and Trust Company, 116 U. S. 307, the act of the legislature of the state of Mississippi, incorporating the railroad company, provided that the company should have the right, "from time to time, to fix, regulate and receive, the tolls and charges by them to be received for transportation of persons or property," did not amount to a contract, and that nothing therein contained prevented that state of Mississippi, afterwards through a commission, from prescribing rates for the transportation of persons and property. The opinion of the court was delivered by Mr. Chief Justice Waite. On page 330 it is said :

> "In Munn v. Illinois, 94 U. S. 113, and C. B. & Q. R. R. Co. v. Iowa, 94 U. S. 155, this court decided that, as to natural persons and corporations subject to legislative control, the state could, in cases like this, fix a maximum beyond which any charge would be unreasonable, and that such maximum when fixed would be binding on the courts in their adjudications, as well as on the parties in their dealings. The claim now is that by section 12, the state has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to deter-

mine what is reasonable, free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified, nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the state had in the matter before the charter it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the state is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention."

And in the case of the Winchester Turnpike Company v. Croxton, 96 Ky. 738, it was claimed by the company that a contract existed between the company and the state under the provisions of the charter, by which the power to regulate and fix rates of toll for travel on the road, by the state, has been surrendered.

Section 15 of the charter provided in substance that it should be lawful for the turnpike company to collect from persons using the road the tolls thereinafter mentioned, and to stop any person until they had paid tolls according to the rates prescribed, to-wit: For every twenty head of sheep, hogs or other small stock, 6¼ cents, etc.

And by section 21 it was provided that if it should at any time appear that a clear income and profits will not yield a dividend of six per centum on the capital stock, it should be lawful to increase the tolls so that a dividend of six per centum could be earned. And it further provided if by the abstracts to be furnished it should appear that the profits yielded a dividend exceeding twelve per cent. then the tolls should be reduced so as to reduce the dividend to twelve per cent. per annum.

By section 20 the company was required once in each year to lay before the general assembly an abstract of its accounts, showing the amount of their capital stock expended in the prosecution of their works and of their income and profits arising from tolls during the respective periods, together with an abstract of the accounts of the costs and charges of keeping the road in repair and other contingent costs and charges and such other information as might be necessary to the end that the clear annual income and profits might be ascertained and known. (pp. 742-743.)

The court said that the question before them was whether the company had a contract with the state, entitling it to collect the tolls fixed in its charter of 1834, in spite of the legislative act of the year 1893, fixing uniform rates for all turnpikes in the state and which are less than those fixed in the company's charter. The court, after reviewing several cases decided by the Supreme Court of the United States and several state decisions, decided that the provisions of the charter of 1834 did not constitute a contract and that the subsequent rates were valid and binding upon the company.

See, also the case of the City of Danville v. Danville Water Company, 178 Ill. 309. S. C. affirmed 180 U. S. 697.

From these cases it seems quite clear that there was no surrender of the right to prescribe rates and that no contract to that effect was made.

Sections 9 and 10 above quoted, are contained in an ordinance of the City of Owensboro granting the right of way in the streets, etc., to the Owensboro Water Company, a corporation which, it is contended by appellee, is not now in existence, and which, it is also contended, assigned to the complainant company, its franchises, its property and property rights.

There is not now, nor has there ever been any general law of the state authorizing any *quasi* public corporation to assign its franchise or its property to another corporation. Chapter 56 of the General Statutes of Kentucky, under which the corporation was organized, contains nothing authorizing such action by any corporation organized under its provisions.

This corporation exercises public functions, it is an agency of the state, the law under which it was created and exists is the measure of its powers. The alleged assignment of its franchises and transfer of its property to the appellee is contrary to public policy, ultra vires and void. L. & N. R. R. Co. v. Kentucky, 161, U. S. 692; Brunswick Gas Light Co. v. United Gas Co., 86 Maine, 532, S. C. 35 Am. St. Rep, 385 and note; Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24; Noyes Int. Corp. Relations, secs. 135-139.

If there had been such contract it would not nave been transferable: Railway v. Gill, 156 U. S. 656.

VI. The validity of the ordinance is questioned in the bill on the ground that the water company was not notified of the meetings of the committee appointed by the common council to

make an investigation and report an ordinance to the council, or the meetings of the council.

In the first place, the statute and laws under which the council was proceeding, do not require notice to the water company of the meetings of the committee or of the council. And in the next place, it is shown that the president of the water company had heretofore declined to furnish any information to a former committee appointed by the common council, or to the common council, and has declared that the company would not furnish any information as to the cost of the plant, or the amount of its income and expenses of operation, or the value of its property, etc.

Unless notice is required by the statute under which the local board or tribunal is proceeding for the purpose of fixing rates none is necessary. This has been determined in several cases, notably the Spring Valley Water Works Co. v. the City and County of San Francisco, 82 Cal. 286, 16 Am. Stat. Rep. 117; San Diego, etc. Co. v. National City, 74 Fed. 81, S. C. 174 U. S. 739-760.

In the case, 82 Cal. 286, the charge was made that the board of the municipalities had acted arbitrarily, without investigation and without the exercise of judgment or discretion without reference to what should constitute just rates, without reference either to the expense involved in furnishing the water or to what was a fair and reasonable compensation therefor, and that the action of the board in fixing the rates was a palpable fraud.

The court, however, found against these contentions of the water company. The case is an important one not only on the

question of notice, but on other questions involved in this case. The subject of the power to fix rates and the various considerations entering into the regulation of rates, are examined and discussed, and a great number of cases, including several supreme court and federal court cases, are cited.

VII. In the San Diego Land and Town Company, 74 Fed. Rep. 79-86, the question of notice was fully considered by Circuit Judge Ross, and it was there held to be unnecessary. This case involved a consideration of many questions involved in the present case. The court went into an elaborate consideration of the proper basis for determining rates and of what constitutes reasonable rates. The bill was dismissed and the case was taken into this court on appeal; the opinion is published in 174 U. S. 739-760. The decree dismissing the bill was affirmed.

Mr. Justice Harlan, who delivered the unanimous opinion of the court reviews many preceding cases on the subject of regulation and rates, After holding that the company was not entitled to formal notice as to the day upon which water rates would be fixed by ordinance, he enters upon a discussion of the principles that should govern municipalities in determining rates, and we quote as follows:

> "That is was competent for the state of California to declare that the use of all water appropriated for sale, rental or distribution should be a public use and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county or town, or to the inhabitants thereof is not disputed, and is not, as we think, to be doubted. It is

equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use; for the state cannot by any of its agencies, legislative, executive or judicial, withhold from the owners of private property just compensation for the use. That would be a deprivation of property without due process of law. Chicago, Burlington, &c. Railroad v. Chicago, 166 U. S. 226; Smyth v. Ames, 169 U. S. 466, 524. But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use. Chicago & Grand Truuk Railway v. Wellman, 143 U. S. 339, 344; Reagan v. Farmers' Loan & Trust Co., 154 U. S, 362, 399; Smyth v. Ames above cited. See also Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 614, 615.

"In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal because it is primarily for the determination of the legislature or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights

secured by the Constitution of the United States, a judicial question arises, and the courts, federal and state, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it is unmistakably repugnant to the fundamental law.

"What elements are involved in the general inquiry as to the reasonableness of rates established by law for the use of property by the public? This question received much consideration in *Smyth v. Ames*, above cited. That case, it is true, related to rates established by a statute of Nebraska for railroad companies doing business in that state. But the principles involved in such a case are applicable to the present case. It was there contended that a railroad company was entitled to exact such charges for transportation as would enable it at all times, not only to pay operating expenses, but to meet the interest regularly accruing upon all its outstanding obligations and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to *all* those ends would be a deprivation of property without due process of law, and a denial of the equal protection of the laws. After observing that this broad proposition involved a misconception of the relations between the public and a railroad corporation, that such a corporation was created for public purposes and performed a function of the state, and that its right to exercise the power of eminent domain and to charge tolls was given primarily for the benefit of the public, this court said: '*It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of per-*

sons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the service rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. If a railroad company has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged.' 169 U. S. 544. In the same case it was also said that 'the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its stock and bonds, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. *What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience, on the other hand what the public is entitled to demand is that no more be exacted from it for the use of a*

public highway that the services rendered by it are reasonably worth.' 169 U. S. 466, 546.

This court has previously held in Covington & Lexington Turnpike Road Company v. Sanford, 164 U. S. 578, 579, 598—which case involved the reasonableness of rates established by legislative enactment for a turnpike company —that a corporation performing public services was not entitled, as of right and without reference to the interests of the public, to realize a given per cent. upon its capital stock; that stockholders were not the only persons whose rights or interests were to be considered; and that the rights of the public were not to be ignored. The court in that case further said: 'Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprive the owner of property without due process of law. . . . The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receives what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public.'

These principles are recognized in recent decisions of the supreme court of California. San Diego Water Co. v.

San Diego (1897) 118 Cal. 556; Redland's Domestic Water Co. v. Redlands (1898), 53 Pac. Rep. 843, 844.

The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating its plant, including interest paid on money borrowed and reasonably necessary so be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. THE BASIS OF CALCULATION SUGGESTED BY THE APPELLANT IS, HOWEVER, DEFECTIVE IN NOT REQUIRING THE REAL VALUE OF THE PROPERTY AND THE FAIR VALUE IN THEMSELVES OF THE SERVICES RENDERED TO BE TAKEN INTO CONSIDERATION. WHAT THE COMPANY IS ENTITLED TO DEMAND, IN ORDER THAT IT MAY HAVE JUST COMPENSATION, IS A FAIR RETURN UPON THE REASONABLE VALUE OF THE PROPERTY AT THE TIME IT IS BEING USED FOR THE PUBLIC. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public."

One of the most elaborately considered cases to be found in the reports of the U. S. circuit courts is that of the Capital City Gaslight Co. v. the City of Des Moines, 72 Fed. 829-850. The opinion was delivered by Judge Woolson. The whole subject is examined in all its phases and almost every case decided by this court up to the time the opinion in that case was delivered is examined or cited. It is especially valuable in its discussion of the various facts which ought to be taken into consideration in fixing rates. The opinion is quite elaborate but it is unnecessary to make quotations from it; it is deemed sufficient to say that it will repay a careful examination.

There is another very valuable case in the same volume: New Memphis Gas and Light Co. v. City of Memphis, 72 Fed. Rep. 933-957.

SUMMARY OF EVIDENCE.

VIII. Having attempted to state the principles of law which it is supposed must be applied in this case, we now come to a consideration of the case as made by the evidence.

The evidence, aside from the exhibits filed, for the appellee consists of the depositions of fourteen witnesses, which are printed in the record, on pages 67 to 180, and in rebuttal pages 288-293.

The evidence offered by the appellant consists of the deposition of eight witnesses, printed on pages 188 to 287 of the record, and the affidavit of Sturtevant filed as part of his deposition on page 282 and also certified copies of certain documents, seven in

number, being the reports made by the appellee to the state auditor, which are printed on pages 294 to 316.

The salient points in the evidence offered by appellant is summarized as follows :

1. Geo. B. Sidelinger (p. 67) of Danville, Ill., has been an employe for eight years of the Danville Water Co., a corporation owned by the same persons substantially as own the appellee company. He visited Owensboro April 2 or 3, 1900, to make an affidavit to procure a temporary injunction; he looked over the plant, found it in good condition, gives his judgment that it would cost $235,000 to $250,000 to replace or duplicate the plant, gives no details; estimates wear and tear two and one-half to three per cent.; it is customary to collect rates in advance; thinks the Owensboro ordinance would ruin the company; thinks running expenses of the plant, apart from interest, would be ten or twelve thousand dollars; is not familiar with company's income; thinks rates under ordinance too low.

The cross examination (p. 70) discloses that the witness knew next to nothing, very little, of the plant at Owensboro; did not know what real estate it owned, the quantity or size of the pipe in the system, could not state quantity of pipe of different sizes. He is not an engineer and no technical training. He was asked questions intended to test his knowledge of the value and cost of laying the pipe in the system, but he was unable to answer. He admits the wear was not as great as he had stated. He testifies that he got his information from officers of the company as to cost of operation; bases his estimates on his experience at Danville, Ill. He states on re-direct examination that he was called to Owensboro more especially in regard to machinery and pipes, outfit, etc.

Edward Hughes, (p. 81) chief fire department, at Louisville, Ky., was at Owensboro in April, 1900, thinks system at Owensboro furnishes sufficient fire protection; knows nothing of the pipe system or the size of the pipe, saw plant in operation at a test made twenty years ago on one occasion.

William J. McGonigale (p. 83) lives at Louisville, Ky., is the auditor and treasurer of the Danville Water Co., Danville, Ill., Owensboro Water Works Co., Defiance Water Works Co., and Frankfort Water Co., Frankfort, Ky., and has been since 1897; values Owensboro plant at $235,000 to $250,000; is able from his official position in connection with appellee to state cost of operating the plant, and puts the cost at $13,000; that the plant is in splendid condition; states generally that its taxes have ranged from $2,500 to $5,000 at different times; has examined the ordinance of the city fixing the rates and says they are below the average of rates, and does not think the company could operate satisfactorily or successfully on that basis; says the revenue under the ordinance from private consumers would be reduced fifty per cent. below the rates now charged by the company; that the company receives now $7,595 on rent of hydrants; states that the net annual loss to the company operating under this ordinance would be $5,600 if all the water service could be collected; that the company has never paid any dividends to stockholders; that it lost last year $3,000 in operation; that the company would receive under the ordinance from domestic service $11,500 and in addition from hydrant rentals, $7,595; estimates operating expenses at $13,000, taxes, $2,500, and depreciation $9,000; estimates loss from domestic service in the neighborhood of twenty per cent.

On cross examination (p. 89) stated he was thirty-two years of age; had been clerk in a bank, in a wholesale grocery, an insurance agent, and then took employment with the water companies; states the capital stock of the appellee to be $355,000 divided into 3,550 shares and gives partial list of stockholders, but declined on advice of the company's lawyer to give a full list of the stockholders. States the bonded indebtedness of the company to be on September 15, 1899, $235,000 or $236,000, and states the floating debt of the company to be $20,000; says the gross income of the company for 1899 was about $29,000; that for the year ending June 30, 1899, $29,764.29; and for the year ending June 30, 1900, that his books showed a gross income of $31,577.43; that the salaries and wages paid for the year 1899 by the company was $4,139.32; that the company received from hydrant rentals $7,384.57, and gives the statement of the salaries paid to some of the officers more in detail; that the company paid in taxes during the year 1899, $2,536.60, and in the year 1900, $1,122.75, but had not paid all of the taxes due for that year; that during the year ending June 30, 1899, company paid for fuel $899.49, and for the year ending June 30, 1900, $893.75; and that there were some other expenses for stationery and office rent at Owensboro. His attention is called to the reports made by the company under chapter 109 Art. 3, Ky. Stats. to the state auditor, wherein the tangible property, pipe system, pumping station machinery for pumping station, tolls, hydrants, lot on which pumping station is erected and vacant lot in Owensboro and three acres of land in Daviess county, was valued under oath at $75,000 and asked to state whether it was approximately correct, but declined to say whether it was correct or not;

that it was made by the president, D. Long Miller, who was then in Louisville, where the depositions were being taken; states that he has no books or records in his possession that will show the original cost of constructing the plant built in 1879, and has no knowledge where the books of the Owensboro Water Co. are; that he had never seen any statements of the original costs of the plant, nor any record or any statement of the cost of the company up to the time of the organization of the present company and had no knowledge or information as to the cost of the water works plant at the time it was transferred to the present company; that the annual interest on the outstanding bonds of the company June 30, 1899, amounted to $12,064.95. When asked whether he had any such experiences as would enable him to state to what extent consumption of water would be increased by a reduction of say of thirty-three and one-third per cent. in rates, he answered that from his "knowledge of such condition the consumption of water would be increased to such an extent that the expense of operating the plant would be added too." That the company has no reservoir and no standpipe, and no means of storing water; that he is not a graduate of any school of engineering or water works architect and never superintended the construction of any plant; could not state the number of miles or feet of pipe in the plant at Owensboro; thinks there is approximately 110,880 feet, or twenty-one miles in the system.

George J. Long (p. 103) estimates the value of the property of the company at Owensboro at $225,000 to $250,000; says the rates prescribed by the ordinance are too low; is asked what the effect of not collecting water rates in advance would be, and

says the company would lose considerably thereby; considers that the actual expenses of operating the plant at Owensboro $12,500, and estimates wear and tear at three and one-half per cent., but says that he got his estimate of operating the plant from statements made by Mr. McGonigale; that he visited the plant April, 1900.

Alfred Walker (p. 109) states that he is a water works and gas works contractor, and has been so engaged forty years; that he examined the water works at Owensboro two or three months previously; thinks the system adequate and that its fair value is $225,000 to $230,000.

On cross-examination (p. 110) stated that he was seventy-three years of age; that he was at Owensboro in April and made an affidavit; that he went over a good portion of the town; that he got a map from the company and examined it; he had no excavations made for examination of pipe. He was asked to state the average cost of laying a water works pipe system with pipe ranging from thirteen inches down to four inches per foot. He could not do this off-hand, he said. He was then asked to give the price of pipe, which he does, and to some extent the cost of laying pipe, and gives estimates. He never examined the plant but the one time.

Charles Hermany (p. 117) lives at Louisville and is a civil engineer. He has been engaged in water works business forty-three years at different points which he names; examined the water works system in April, 1900; found the system generally in good condition; examined the intake pumping station in 1883, and also in April, and also examined the maps of the water company; from the representation made to him and infor-

mation on that day he estimated the distributing water pipes, hydrants, gates, etc., at $120,000; the pumping station, machinery and appurtenances thereto belonging, I estimated upon that day as worth $110,000, total, $230,000; from representations made would say that the system was efficient for fire protection and furnishing water for domestic consumption. His statements were based upon representations made by the water works people; had examined the ordinance and his impression was that the company could not pay fixed charges under the rates.

On cross-examination (p. 119) says the Bowling Green plant was constructed in 1868 or 1869, and is owned by the city. He was then asked various questions as to proper plans for constructing water plants and give theories.

C. C. Hooper (p. 124) says he examined the smoke stack and buildings at the pumping station in April, 1900, and they were in good condition then.

William Rudd (p. 125) is an insurance agent at Owensboro; says insurance rates have been reduced since the plant was remodeled eight years ago.

On cross-examination (p. 149) he modified his statement that rates had been reduced by reason of the fact of overhauling the water plant; said it was due also to the good fire department maintained by the City of Owensboro, and thinks the rates at Owensboro are the same as those at Henderson, but knows nothing of the rates for insurance in the other third class cities of Kentucky.

Asa Williams (p. 129) states that he is thirty-five years old, lives in Owensboro, and is engineer of the Owensboro Water Works Co., and has been for seven years. He described the build-

ings and machinery, pipe system, etc., and files a map of the system, (page 150); says there is twenty miles of pipe ; states they have 1,000 "taps" 250 of which are not in use, and ninety-eight meters, which cost $7.50, $10 and $14 : the plant is operated day and night and requires two sets of hands, there being no reservoir ; the cost of operation he would say was $7,000 or $8,000 ; he files copy of the ordinance passed by the council; thinks reduces the rates from thirty to fifty per cent. ; that the pumping station was remodeled in 1890 ; considers the fire protection first-class.

On cross-examination (p. 141) he stated that the company had about 200 feet of 16-inch pipe, running from the pumping station to the intersection of Main and Triplett ; about 600 feet of 20-inch pipe, used as suction pipe from the river to the station, another suction pipe of fourteen inches ; there is in the system 5,645 feet of 12-inch pipe : he makes a calculation and makes it 5,523 feet and then 5,075, and finally fixes it at 5,600 feet ; that there is approximately 300 to 400 feet of 10-ich pipe ; 10,432½ feet 8-inch pipe, and that since April there has been 562 feet of 8-inch pipe put in ; that there was 60,100 feet of 6-inch pipe ; 29,075 feet of 4-inch pipe ; and 1,300 feet of 3-inch pipe ; and 200 feet of 2-inch pipe ; 163 hydrants ; does not know the number of valve boxes, but is between 100 and 200, and 103 water meters in operation ; and 1,627 "taps," of which 1,230 are in operation ; one 10-inch valve, four 16-inch valves, two 14-inch valves, one 12-inch valve, two 10-inch valves, eighteen 8-inch valves, about eighty-nine 6-inch valves, about sixty 4-inch valves, about three 3-inch valves. He was paid a salary of $1,200 in the year 1899, from January

1 up to July 1, he got $93 and some odd cents (?) per month, and from that time on $110 per month, and $15 per month for a horse; another employe, Woods, gets $50 per month; and another, Augustine, gets from $45 to $65 per month; thinks the coal used in 1899 cost $1,200, and that the coal cost from $1,100 to $1,200 per year, but says he don't know about that and cannot state; says that upon a neat calculation the reduction by the ordinance would probably be thirty-three and one-third to forty per cent. He was then asked what the effect would be assuming that the ordinance rates resulted in an increase of consumers of 40 to 50 per cent, whether the company's income would not be as great as under the company's rate; he thinks not, because running expenses would be greater; all he knows of the gross income of the company is from the auditor's statement; he was asked (p. 146, q. 134) "Is it not a fact that the officers of the company, to your personal knowledge, made a calculation as to the effect of this ordinance and ascertained from such calculation that the reduction would be equivalent to about one-third?" And he answered, Yes; and deducting hydrant rentals from the gross income of $31,000 per annum the ordinance would reduce the income of the company from private consumers down to $15,000 to $17,000 instead of $23,000. He estimates that the repairs cost from $2,000 to $3,500 per year; states the cost of pipe to be from $25 to $33 per ton.

Thomas Yeager (p. 148) has been connected with the Owensboro fire department for several years and since the remodeling of the water works system, pressure has been good at fires.

Henry Steubing (p. 149) is employed with the water works company at Evansville, Ind., and connected with water works business from 1876 to 1881, and from 1886 to 1888, and from 1891 and in 1900, and visited Owensboro in April, 1900, and then examined the engine house, boiler house, machinery, etc., and went over the map of the pipe system, and then estimated the value at $257,000 ; he has examined the ordinance of March, 1900, of the City of Owensboro and that the rates are lower than the rates collected in the city of Evansville.

On cross-examination (p. 150) he stated that the cost of repairing machinery increases as it grows old ; that the machinery at the station would probably amount in wear and tear to four per cent. per annum ; he did not examine the pipe system except to look at the map ; he estimates pipe at $30 per ton. He is shown a table prepared by Mr. William R. Reeder, civil engineer, member of the state board of engineers and of the American Water Works Association, giving the average cost of laying water pipe from actual experience in the construction of thirty different water works plants by him, the prices given in the table is the cost of laying different sizes of pipe, estimating the pipe at $30 per ton, including the cost of pipe, cost of lead, cost of hemp packing cost of excavation, drayage, refilling, pipe laying, cartage a distance of two miles, superintendence, and he states the cost of laying 12-inch pipe per foot at $1.56½, and he is asked to state whether these figures correspond with his experience and whether they are approximately accurate and correct in his opinion ; he answers that the figures given in the table are a very fair average, except that the pipe given in the table is a little lighter than the pipe now is, and he thinks the

cost of labor has advanced ; he says the increased cost on account of weight of pipe would probably be three and one-half to five per cent. ; the cost of pipe laid in the ground is given him from the table as follows: 4-inch pipe per lineal foot, forty-seven cents ; 6-inch pipe, sixty cents ; 8-inch pipe, ninety-three cents; 10-inch pipe, $1.26 ; 16-inch pipe, $2.30 ; 18-inch pipe, $2.70 ; 32-inch pipe; $4.20 per lineal foot ; and he answers that the table gives a fair average of prices except that pipe is now some heavier. He is asked that if by the provisions of the ordinance water rates may be collected in advance, as is contended by the city, would there then be any loss, and he says not, except the ordinary losses ; and says in answer to question when his attention is called to the provisions of the ordinance that it is limited in making collections for water service to those cases only where meters are attached, and that the company is not prohibited by the ordinance from securing the payment of the rates.

J. Tandy Ellis (p. 156) is vice-president of the water works company and had no notice of the passage of the ordinance except what he saw in the newspapers.

On cross-examination (p. 157) he stated that the ordinance was published in the papers ; that he knew the ordinance was pending in the council ; that he made no request of the council to be heard in any way ; that he did not offer the city or any of its officers any information on the matter : and that no member of the company as far as he knows, requested a hearing ; that he receives a salary of $100 per month.

Owen Ford, (p. 163) of St. Louis, Mo., a consulting engineer sixteen years estimates the value of the property at $245,000 or $250,000.

J. W. Holmes, (p. 167) manager of the United States Cast Iron Foundry Co., is now located at Bessemer, Ala., was engaged in construction of water works in 1884 and up to 1892, since which time he has engaged in manufacturing pipe and machiner or water works; has been familiar with water works system of Owensboro since 1889 in the employ of the company, and again examined the works in April, 1900; was engaged in making improvements in the water works system at Owensboro from 1889 forward about two years; describes the pumping station and capacity of the pumps; says the property is effective; estimates the value of the pumping station at $140,000 and of the distribution system at $140,000; considers the rates in the ordinance unreasonable and unjust; says the expense of operating the plant, including taxes and interest on bonds from 1889 to 1898 was about $26,000 per annum; thinks the ordinance fixing rates violates the original ordinance, secs. 9 and 10.

On cross-examination (p. 170) says he owns 950 shares of stock in the appellee company and gives other stockholders; has no knowledge or information as to the original cost of the plant; knows nothing of the books of the Owensboro Water Co.; his first connection with the company was in 1889, for the purpose of making recommendations regarding improvements to modernize the plant, and visited the works several times during the progress of improvement, and was employed several years at $500 per annum; at the time he associated himself with the company, the bonded indebtedness was $200,000 and $38,000 was issued and sold to cover cost of improvements and extensions.

Frank Scofield, (p. 183) water works engineer, New Albany,

Ind., has been engaged in constructing various water plants costing from $16,000 to $500,000; examined water plant in Owensboro in March, 1900; found it in very good condition; value the plant at $250,000; has examined the ordinance and finds the rates too low; says it would cost $25,000 per annum to operate the plant under economical management.

IX. The evidence offered by the appellant, the City of Owensboro, is summarized as follows:

Charles F. Sturtevant (p. 188) is thirty-eight years of age, and a resident of Chicago, Ill., and a member of the firm of Sturtevant & Todd, consulting engineers; is a graduate of the University of Maine; has been engaged in his professional work for fourteen years, and has designed and constructed and superintended the construction of twenty-one or twenty-two water works systems; visited Owensboro in April, 1900, and remained a few days, and afterwards in May, 1900, and remained four or five days; and on these visits made a thorough examination of the buildings and lots, boilers, pumping machinery, connections and the other parts of the plant, but made no excavations of the water main pipes in the streets, but ascertained from the maps and records of the company the number of feet of pipe and the different sizes in the water works system; he states that from the maps and data he found 400 feet of 20-inch pipe; 600 feet of 16-inch pipe, these two sections being on the suction side of the pump and laid into the river and composed the intake. Then in the distribution system proper we found 5,600 feet of 12-inch pipe, 300 feet of 10-inch pipe, 10,759 feet of 8-inch pipe, 60,100 of 6-inch pipe, 28,075 feet of 4-inch pipe, 1,300 feet of 3-inch pipe; this composing the amount of cast iron pipe in the

system, and 200 feet of 2-inch pipe. He was then requested to give an estimate, first of the original cost, second of the present value of the pipe, and third of duplicating the pipe at this time, and in doing so to state the value of it laid down in the ground, including excavations, lead, refilling, and all the cost of labor and material and including special castings. He says in answer that he ascertained as accurately as possible the prices of pipe supplies that prevailed at the several different times at which the plant was started and extensions made of it, and estimated the original cost of the original water main pipes, not including the suction pipes, from the pumps to the river at $70,000. This, however, does not include the valves, valve boxes and hydrants, but does include all labor, lead, hemp, etc., in laying the pipe in the ground as it is, complete, including excavations, refilling and all labor connected with laying it; and he estimates the total cost of the water main pipes, hydrants, valves, special castings, meters and taps, approximately as they existed at the time his observations were made, at $86,340. In answer to the second part of the question as to the present value of the system of water main pipes, hydrants, meters, taps, etc., laid complete, including all labor, he estimates that to be $76,958. And in answer to the third part of the question in reference to the cost of duplication, would say that at present prices of cast iron pipe, special castings, hydrants, valves and supplies and labor, the present system of pipes used in the distribution system, can be made for approximately $70,000, this however, does not include the two suction pipes from the pumps to the crib.

He was then asked to give a statement of the present value,

original cost, and cost of duplication at this time of the pumping station, including its engines, machinery, pumps and suction pipes and all parts of the pumping station as he found it when he made his several examinations; and he answered that for the original cost of that part of the system not covered in the previous sections, namely the suction mains, intakes, power station, pumps, boilers, and all the appurtenances in and about the station he estimated the power station at $5,500; pumping machinery and appurtenances, $14,400; boilers, $3,100; and two lots of land, $2,500; and he estimates the present value of the parts of the system above stated at the figures named, less three per cent., for annual depreciation. And he estimates that at the present prices of material for pipes, hydrants, valves, lead, labor, etc., and the present prices of pumping machinery, that the plant could be duplicated for approximately $114,230. He then gives the number of the valves of the different sizes and states their approximate value at $2,000. He states the number of hydrants and their value at $4,025, and the valve boxes at $322; he estimates the value of the water meters and water taps at $6,840. He describes the buildings at the pumping station and the smoke stack and values them at $5,000. He was asked to estimate the original cost of the engines, etc., and again put it at $14,400, and the present value of them at $14,000. He describes the boilers and machinery also in detail and says that he estimates the total cost of the system at $111,840, and he was asked then to state the total cost of duplicating the system at this time, considering the present value of material and labor; and he said that he estimated the cost of duplicating the system now with equal capacity of pumps, equal sizes of water

mains, equal number of hydrants, valves, etc., at approximately $114,230; that he said would be the cost of an entirely new plant, and every part of it an exact duplicate of the present system. He was then asked to give the total value of the water works system and plant including all its property of every kind and description, its real estate, houses, pumping station, machinery, pipes, engines, pumps and pipe system—everything about it; and he stated that the present value of the system, deducting for wear and tear and for repairs that would necessarily have to be made, was $76,978. And he says that he means by repairs that would necessarily have to be made that such repairs are constantly necessary to keep the machinery in effective condition. He was then asked to give the annual cost of operating the Owensboro Water Works system, giving the various items in detail, based upon his examinations, and he states it at $6,100 per annum, giving details. He estimates that the wear and tear annually on the present value of the plant would be approximately $2,500, and explains what is properly included in wear and tear. He states that the size of the pipe in this system would not, under the methods of standard construction and under the best practices in different cities and towns through the country, be regarded as ample and adequate in point of size to furnish the customary fire protection demanded and properly considered as being possible in case of one or more fires breaking out in different parts of the city at the same time.

His attention being called to the fact of there being 60,100 feet of 6-inch pipe in the system, that is, over eleven miles, he says that is a greater amount than allowable under methods of good

design ; that the system would be more efficient if it had more large pipe in it ; that the system ought to have in it properly distributed to render it adequate about 14,000 feet of 18-inch pipe, 14,000 feet of 14-inch pipe, 6,000 feet of 12-inch pipe, 8,000 feet of 10-inch pipe, 22,000 feet of 8-inch pipe, and not to exceed 40,000 to 45,000 feet of 6-inch pipe, laid in short lines, that is connecting lines, between the larger pipe for short distances so that it would not be required to furnish an undue amount of water flowing in one direction in case of fire. Says that in the event of two or three fires at one time along the line of the 6-inch pipe in the present system, the pipe would be entirely inadequate. There are no stand pipes or reservoir and no mode of filteration employed ; that there are two or three "dead ends" where water accumulates and decays, which is more or less dangerous to public health ; that under the conditions that exist at Owensboro that in remote parts of the system the mains ought to be flushed once a week.

He states that during his experience in the last thirteen or fourteen years he has had occasion to examine the rates for water in several places and to prepare such rates in several places which went into effect ; that he had examined the scale of rates in the ordinance of March 19, 1900, and that it seems to him the rates are fair and reasonable when taken together in connection with the conditions under which the water works system here is operated. He says the method of pumping or rather the character of the pumps could be increased and bettered ; that the pumps are not of the highest duty, one has a capacity of 2,000,000 gallons per day and the other approximately 4,000,000 gallons ; one is eight or nine years old and the other four or five.

On cross-examinafion (p. 198) states that he made particular examination of the pumping station, plant, machinery, etc. ; he places the value of the pumps, No. 1 at $4,500 and No. 2 at $10,000, and describes the pumps particularly, and is examined particularly as to the machinery at the pumping station—the wells, pipes, etc. He states the prices of pipe per ton and the variations in the prices ; and a tedious examination is gone into on various matters connected with his statements in chief, but the witness does not modify his original statements.

On re-direct examination (p. 215) he states more in detail the legitimate cost of operating the plant making it $6,100 or $6,200. He further stated that he with other experts employed by the city had difficulty at first in making any examination and were refused access to the station by the company ; that the city authorities had to apply to Judge Evans and get an order requiring access to be given ; that he was unable to obtain from the water works company any information or to see any books showing gross income, or net income, or which pertained to the financial part of the management ; that he was here on two or three different occasions spending several days for the purpose of making an examination of the water works plant and system at Owensboro ; that he was accompanied by Mr. Cummings, Mr. Shifley and Mr. Wiegal, and one or two members of the city council.

Mr. Sturtevant refers to and makes part of his deposition his affidavit, printed on pages 282–286 of the record wherein the property of the company is particularly described and values given for all the various parts of it. Also operating expenses per year, etc.

James P. Wiegal, (page 216) residence at Henderson, Ky., is sixty-nine years of age and by occupation an engineer and contractor; has lived in the city of Henderson since 1857; was superintendent of the Henderson Water Works about seventeen years; the city of Henderson is thirty miles from Owensboro, and has a population of about 12,000. The city has a water works plant, built in 1875 or 1876; he is familiar with the Henderson water works system, its pumping station, machinery, engines, pipe system, valves, and pumping apparatus, and during his superintendency he laid some twelve or fifteen miles of pipe and put in two pumping engines; he describes the pipe system: it has 2,200 feet of 4-inch pipe, 9,340 feet of 20-inch pipe, 15,400 feet of 12-inch pipe, 900 feet of 10-inch pipe, 600 feet of 8-inch pipe, 2,500 feet of 6-inch pipe, 28,800 feet of 4-inch pipe, and 14,400 feet of 3-inch pipe, 1,950 feet of 5-inch pipe. He was then asked to state the cost of the different quantities of the different sizes of pipe used in the Henderson system, which he does (pp. 217–219). And he also gives the cost of the pump pits, the three engines used, the gate houses, and the two stand pipes, and thirty-seven acres of land belonging to the city upon which a reservoir and an abutment to protect the river bank and ground, stating the total cost of the system at Henderson at $212,000. He states that at the request of the authorities of the City of Owensboro, he made an examination of the Owensboro water plant in connection with Messrs. Sturtevant, Cummings and Shifley, and that after such examination he made an estimate of the value of the same and fixed it at $80,000. He was then asked to state from his examination of the Owensboro water works plant and from his own experience as superintendent and

operator of the Henderson water plant during seventeen years, what he would consider the fair and legitimate expense of operating the Owensboro plant for one year; and he put it at about $5,000 to $6,000, and said it might amount to a little more. He said the average cost of operating the Henderson plant taking the two or three years just preceding his resignation, which occurred January 1, 1898, was about $6,000, but he did not include in this, annual taxes or anything for wear and tear, or any cost for additions to the plant itself, simply the operating expenses proper. He received a salary of $1,800 at Henderson. He stated in answer to a question that from his observation and experience, the Owensboro plant was faulty in its pipe system; that the pipes are too small for anything like a big fire. He said large pipe ought to be laid parallel and about two streets apart and connected by 6-inch pipe. He said the examination of the Owenboro plant by himself and the others mentioned was carefully made and that his estimate he thinks of the value of the property is a fair one. He was then asked to go into details as to the cost of laying water pipe, estimating the pipe at $30 per ton at Owensboro per lineal foot, and he stated it as follows, (pp. 257–258): 4-inch pipe, about forty-seven cents; 6-inch pipe, about sixty-five cents; 8-inch pipe, ninety-five cents; 10-inch pipe, $1.25; 12-inch pipe, $1.55; 16-inch pipe, $2.30; 18-inch pipe, $2.70; 20-inch pipe, $3.20, and 24-inch pipe, $4.20. He said that a contractor in laying down pipe at Owensboro or Henderson could make money at those prices, both cities being situated on sandy plains. He said the city of Henderson had bought a lot of pipe this fall, fall of 1900—at $26.75 per ton; that the large pipe laid several years ago cost $17 to

$18 per ton, f. o. b. Henderson, but that iron was extremely low at that time.

On cross-examination (p. 250) he said he had about seventeen years experience as superintendent of the Henderson water plant; that he superintended the works generally, laid down pipe, bought pipe, made contracts, etc.; that prior to that time had been an engineer, operating and setting up engines. He was asked the value of the pumps at Owensboro, and stated that the contractor for this Buffalo pump had told him that he got the Owensboro contract, according to his recollection, at $10,000, which was something more than five years ago. He supposes the pumps at Owensboro would cost $12,000; that the wells would cost about the same.

On re-direct examination (pp. 230–233) he modified his statement as to the cost of operating the plant if it was run day and night, and said he thought that would probably increase his estimate of the cost of operation $2,000. He said that recently the city of Henderson had put in a new pump of the capacity of 3,000,000 gallons per day, which cost $14,000 in place, and that this pump was a great deal better than either of the pumps at Owensboro; that it was constructed by Allison & Co., at Milwaukee. The pump was put in the station at Henderson in 1899. That this new Henderson pump is better than both the Owensboro pumps.

Robert A. Cummings, (p. 233) civil engineer and contractor and was educated as civil engineer at London, England, and has practiced his profession since 1883; has had experience in hydraulic work in Philadelphia, Virginia, and West Virginia; has designed water works systems. He was engaged three or

four days at request of city authorities to examine water plant here in April, 1900. Says the original cost of the entire plant was $119,981.25 when constructed, giving in detail cost of different parts, (pp. 234–236); is asked to give present value of plant and places it at $87,250. Says the foregoing property, at present prices could be duplicated, the pipe put in the ground—and the plant ready for business for approximately $124,000; says present prices for such material are seventy-five per cent. higher than prices heretofore. Says the fair and legitimate operating expenses of the Owensboro water works plant, including salary and wages of superintendent, officers, clerical force, stationery, coal, oil, waste, and all other expenses of operating plant on fair and and economical basis for one year should be $5,600. Says four per cent. is fair estimate of annual depreciation; says buildings are in need of repairs and hence depreciated in value—smoke stack very much in need of repairs. Says Owensboro water works system as constructed does not afford adequate fire protection.

On cross-examination (p. 236) says he arrived at value of pumping engines from comparison with what a first-class pumping engine should cost. Has made plans and specifications and actually constructed water works systems at Camden, N. J., Philadelphia, Pa., Bluefield, W. Va., Columbus, O., Roanoke, Va. Says Owensboro Water Company has direct system of pumping water from river. Says 6-inch pipe will not afford sufficient fire protection to any business street in Owensboro constructed as they are now; saw disastrous fire and saw plug fail during that fire. Says he arrived at his estimate of the running expenses of the plant at Owensboro, by the salaries, the wages of

the superintendent, officers, clerical force, making allowances for stationery, and individual knowledge of what coal cost, the cost of oil, etc., and added together for approximate cost. Is not familiar with the individual wages paid, but knows what they could be duplicated for. In estimating value of pipe system uses $30 per ton as a basis. Was not a contractor at time examination of water plant was made.

On re-direct examination (p. 240) says he has been actually engaged in constructing water works plants in Philadelphia, Pa. and elsewhere as already stated.

C. W. Bransford (p. 242) is forty-two years old, lives in Owensboro, and is engaged in milling business, and has been about thirteen years; says he used water of the Owensboro Water Works Co. up to about 1896, and paid about $150 per year, when rates were raised; says it would have cost him about $500 or $600 for same quantity of water if he had continued to use water company's water at new rates. Sunk a drive well, as he could not afford to pay rates charged since 1896. Says rates now charged for water is prohibitory as far as he is concerned. Says the approximate daily average of flour made by him during 1896 was 100 barrels per day. Says he has had entire supervision of his milling business since 1893.

On cross-examination (p. 243) says he has been a citizen of Owensboro all his life; thinks the water company gave as an excuse for raising rates that taxes had been increased. Paid fifteen cents per thousand gallons under old rates. Says new rates made it thirty-five cents for the first 10,000, then they had a graduating scale for increased quantities running down—the rate got less as the quantity increased, and ran down as low as ten

cents per thousand gallons. Says so far as he knows no manufacturing concern in Owensboro. with the exception of ice factory, uses water from the present water company. Has never tried to ascertain amount of water he is using now, as his pump supplies more than he can use.

Re-examined, (p. 244) and he said he could not state approximately what it now costs to supply mill with water by his well; thinks it requires no additional steam to operate pump, and has never had any repairs to make since installed. The only expense is indirect, being for a compound to prevent boilers from scaling, and the necessity of cleaning out boilers, pumps and pipe, which he supposed would amount to $150 or $200 per year.

On re-cross examination says he considers present method of supplying his plant with water a very cheap one, but would much prefer using soft water.

Mr. Bransford appears and desires to make certain corrections (p. 246–): "In my deposition yesterday, I stated that the Owensboro Water Works Co. charged me fifteen cents per thousand gallons for water and that my annual water rent was about $150. I find that instead of there being a fixed charge of fifteen cents per thousand gallons, the charge was fifteen cents for the first 400,000 gallons, twelve and one-half cents for the next 500,000 gallons, and ten cents per thousand for the balance. Those were the rates prevailing prior to April 1, 1896.

"I stated yesterday in my deposition that their present rates were thirty-five cents for the first 10,000 gallon; thirty cents for the second 10,000; twenty-five cents for the third 10,000, etc. I find the rates are as follows; thirty-five cents for the first 30,000 gallons; thirty cents for the second 30,000; twenty-five

cents for the third 30,000; twenty cents for the fourth 30,000; fifteen cents for the fifth 30,000; fourteen cents for the sixth 30,000; thirteen cents for the seventh 30,000; twelve cents for the eighth 30,000; eleven cents for the ninth 30,000; ten cents for the tenth 30,000; nine cents for the eleventh 30,000; eight cents for the twelfth 30,000; seven cents for the thirteenth 30,000; six cents for the fourteenth 30,000. This graduated scale of prices is for so much water used per month." Says he is making these statements from bills he has and will file these bills as part of deposition, and mark them A. B. C. for identification, pp. (247–250.)

Charles Broeker (p. 250) says he is forty-one years of age, resides in Owensboro, Ky., and is engaged in the milling business. Has lived in Owensboro a little over eight years. Manufactures flour, meal and feed. Mill has a capacity of 350 barrels of flour per day. Used water of Owensboro Water Co. up to November 1, 1897; since then obtained it from river by driving a pipe from mill to river and pumping water from river. Quit water company because rates got too excessive. Rate was increased in 1896, and prior to increase was paying $60 per year; under increased rates water amounted to from $15 to $19 a month. Has been engaged in milling business twenty-five years, and has management and control of his manufacturing plant in Owensboro. Says a miller such as he is cannot afford to pay rates of the water company. Was engaged in milling business at Springfield, Ill., and Greenville, Ill.

On cross-examination (p. 252) says it costs him about $5 per month to pump his own water from river. Says he has just been elected as councilman. Has not applied to water company for special manufacturers rates since he changed.

On re-examination says he was elected member of council to fill a vacancy caused by a resignation.

Re-cross examined says has been a citizen of Owensboro eight years, and that the taxes were raised by city on water company.

Charles A. Haney (p. 253) says he is fifty years old and is chief of fire department; has been chief since preceding January. Attended fire second of July that occurred in Owensboro in which buildings of Marsden Co. was destroyed. Was there from 9:30 until two or three o'clock in morning. Observed water supply and found it insufficient; would not throw water up to fire; valves were open fully. Four streams turned on, and water was insufficient from two of them; wouldn't throw water up to eaves of roof where fire was; building forty or fifty feet high. Nozzle was an inch nozzle. Had two hose attached to hydrant of one inch each.

On cross-examination (p; 255) says in his opinion failure to get sufficient stream of water was due to lack of pressure. Saw that water was turned on fully at Clay street plug; it was all turned on. Was asked if he knew of his own knowledge why the hose when carried up into the building to a window, would throw the water to the eaves, while it would not do it from the ground; and said he supposed it did not have pressure enough. Does not know about effect of water pressure on different nozzles. Was asked if too much pressure did not interfere with fire by reason of the inability of the men to handle the nozzle; said he had never seen any time yet they could not handle it. Said if there was too much pressure it could be regulated at hydrant. We asked what damage was caused by

not having pressure; answered it would hardly reach to the eaves of roof.

On re-examination (p. 262) was asked if the hose were attached to the nearest hydrants to the fire; and answered yes.

E. B. Shifley (p. 264) says he is thirty-five years old, lives in Owensboro and is city engineer and a civil engineer; has been acting as civil engineer for over fifteen years. Has had experience in planning water works systems, laying pipe and such work. Has been engaged in work as civil engineer in Bucyrus, Ohio; Bellevue, Ohio; Spokane, Wash.; Plainfield, N. J.; Sewickley, Pa., Richmond, Ind.; Cambridge City, Ind.; Milton, Ind.; Toplin, Ind.: Olympia, Wash.; Galion, Ohio; and Owensboro, Ky. Says he visited the pumping station of the Owensboro Water Works Co. with Mr. Weigal, of Henderson, Mr. Sturtevant, of Chicago, and Mr. Cummings, of Owensboro, and made an examination of the water works plant, its pumping station. boilers, engines, etc., and familiarized himself as far as possible so as to make an estimate of the original cost, and estimated the same to be $115,000; and the present value of the property to be $84,000. Was asked what property entered into his estimate. Says there were three boilers, and he estimated the present value of these to be $2,700; pump designated as No. 1, was estimated at $4,000; pump No. 2 at $6,000; buildings, $10,400; (?) two suction pipes at $4,800; the distribution system estimated $84,600. He estimates the total cost of the pumping station, including all the pumping machinery, wells, boilers, machinery and ground—everything except the distribution system—at $30,400. Was asked to give a particular statement of the amount of the pipe they have of the different sizes,

and says they have 400 feet of 20-inch pipe, suction pipe; 600 feet of 16-inch, 5,600 feet of 12-inch, 300 feet of 10-inch, 10,750 feet of 8-inch, 60,100 feet of 6-inch 28,075 feet of 4-inch, and 1,300 feet of 3-inch pipe. Says 20-inch pipe is worth laid in the trench, $932; 12-inch pipe, $5,716; 10-inch pipe, $346; says this is net cost of these and he added a per centage for incidentals—ten per cent. for incidentals. He estimates the 10,750 feet of 8-inch pipe at $6,342.50; the 60,100 feet of 6-inch pipe at $7,500; (this is a manifest mistake in the printer, it should be $27,045) the 27,075 feet of 4-inch pipe at $8,984; and the two and 3-inch pipe at $286. He made an estimate for special castings on statement made to him by Mr. Martin, superintendent of the water company. Was asked to state, as near as he could, what the plant could be duplicated for today at present prices estimating the pipe at $30 a ton, laid down and complete, in working order in Owensboro, and out of new material; and he stated: "At $30 a ton for castings, it could be duplicated for $114,230." Says $6,100 is a fair estimate of the annual expenses of operating the plant economically and well. Says depreciation will amount to three per cent. per annum; says the Owensboro Water Works Company has no reservoir or standpipe. Says it does not afford adequate fire protection because there is too large a per centage of small pipe. Says no system of filtration is used by the Owensboro Water Works Company, being pumped direct from river into mains. Says it is not fit for domestic service during high water without sedimentation.

On cross-examination (p. 268) says he has been city engineer in half a dozen cities. and has been in the profession about fifteen years; was six years at Bucyrus, Ohio. Has seen a great deal

of the pipe system of water company in excavating the streets during the past summer while improving streets in Owensboro. Was asked the amount of pipe of Owensboro Water Works Company in and around city; answered if he had made no mistake in addition, there were 106,125 feet, from three up to twenty inches. Says pumps were made by a Buffalo firm and partly rebuilt by the New Albany Pump Company. Knew value of pumps through Mr. Sturtevant, who obtained value from manufacturer. Says pipe system approximates 22.8 miles, with an average depth under ground of three feet. Has graded the streets lately and found some places where the pipe were so near the surface that they had to be laid deeper.

F. A. Ames (p. 276) resides in Owensboro and is a carriage manufacturer, and has been so engaged in the city sixteen or eighteen years. Employs 125 hands; made 5,700 carriages last year. Says the water rates charged by appellee were increased in 1896, whereby the rates instead of being $5 were put up to about $20 per month; gives particular statement and files several receipts from the Owensboro Water Works Company. He says the company affords inadequate fire protection; there has been lack of pressure and in some cases insufficient water; mentions instances. That there has been great complaint of the insufficiency of the service of the water company at fires. Says he is a housekeeper and that the water furnished is unsafe for use unless carefully filtered; that when the river is high the water is wholly unfit for domestic uses. That he was compelled to sink a well for the use of his plant; that manufacturing establishments in Owensboro cannot afford to pay the rates charged by the company. That the rates charged by the com-

pany for domestic service are extremely high, and as compared with other towns of this size, he would say were more than double.

X. In commenting on the evidence it is desired at the outset to point out the character of that offered by the appellee.

1. As to that offered relative to the value of the plant, what is it worth? Do those vague, general statements satisfy the mind of the court? The appellee had it in its power to have shown to the court the original, actual cost of this property, the cost of all improvements and extensions, They could have shown the cost of every part down to the last detail. The original cost would have thrown strong light on *its present value* —the essential and one of the most important facts to be considered in determining the reasonableness of rates. They made no effort to show what the various parts of the plant could be duplicated or reproduced for today. This fact, like the fact of original cost, if shown would not be conclusive but would throw light upon the present value of the property. They have not placed before the court these facts or any of them, but on the contrary, have studiously avoided doing so and have concealed them. The bill and the evidence avoids the essential facts *all necessarily within the knowledge of appellee*, and essential to a full and fair consideration of the case.

2. As to the annual expense of operating the plant. The evidence offered by the appellee is equally unsatisfactory. When it is considered that the company has books and records by which it could have shown to the last dollar the annual cost of operation from year to year—for ten years if necessary—the mind is irresistibly forced to the conclusion that the appellee

could not, consistently with its interest, afford for the whole truth to be disclosed, and therefore the policy of evasion, concealment and suppression was adopted. Details are avoided. Gross sums and general statements only are given. When by cross-examination it is sought to descend into details the witnesses for the most part, nearly all of them being either employes or engaged in like business, some for the same people elsewhere, give evasive answers and sometimes refuse, on advice of counsel, to answer at all.

Certainly the inference to be drawn from this course of conduct must be unfavorable to appellee.

3. It is axiomatic that those who appeal to the chancellor should do so with clean hands, should candidly and fully state all facts material to the cause, should produce all the evidence in his power that will aid the court in arriving at a just decision.

The pleadings of the appellant, the course pursued in the cross-examination of the appellee's witnesses, the examination of appellant's own witnesses, all show that the appellant city has sought to lay before the court, in the fullest manner posssible, every fact material to a just decision of the case. Appellant has endeavored to show in detail the original cost, the present value and cost of duplication of every part of the water plant at Owensboro; the real estate, the buildings, pumping station, with its well, its suction pipes, pumps, engines, boilers, pipes to the mains, the number of feet of pipe of the different sizes, the cost of laying, giving in detail every item of material, labor, and expense connected therewith; the value of the valves, hydrants, meters, boxes, taps, etc., and these valuations are made by competent persons, skilled in the business.

4. Sturtevant, an educated engineer, seventeen years steadily engaged in the construction of water works systems, constructing and superintending the construction of over twenty different plants, familiar with every detail of such work, carefully examined the plant, and he describes fully and with the greatest possible particularity every part of appellee's property and *values it as it stands in the present condition at $76,958.* He attempts to, and no doubt states approximately the original cost of it—$111,840—and then makes an estimate based upon actual knowledge and experience of the cost of duplicating the plant at $114,230.

5. Mr. Weigal, not a college graduate to be sure, but a machinist, and for about seventeen years continuously and up to January 1, 1898, superintendent and manager of the municipal water plant owned by the neighboring city of Henderson, a city only thirty miles distant, similarly situated and nearly of the same population and territory. One object of his evidence was to contrast the two water plants, prove the cost and value of the Henderson plant, and the different parts of it, and their value, the size of the pipe and mains, etc., and then prove by the witness from his personal examination and inspection, the value of the Owensboro plant and show wherein they differed. This puts before the court a mass of facts that are valuable in considering the case. For example, in the Henderson system there are 2,200 feet of 24-inch pipe, in the Owensboro system, none; in the former, 8,430 feet of 20-inch pipe, in the latter none, except 400 feet of suction pipe; in the former 17,400 feet of 12-inch pipe, in the latter 5,600 feet; in the former 900 feet of 10-inch pipe, in the latter, 300 feet; in the former 600 feet of 8-inch,

in the latter, 10,750 feet; in the former, 2,500 feet 6-inch pipe, in the latter, 60,100 feet; in the former, 28,800 feet 4-inch pipe, in the latter 28,075; in the former, 14,400 feet 3-inch pipe, in the latter 1,300 feet, etc. The cost of the 24-inch and 20-inch pipe in the Henderson system is $35,000 while there are no such pipe in the distribution system at Owensboro. There is more than three times as many feet of 12-inch pipe in the Henderson system as there is in the Owensboro; the difference in cost being about $19,000. There are in the Henderson system several parts that do not exist at Owensboro, namely, two standpipes, $20,000; thirty-five acres of land, $7,000, (Owensboro, $2,500) a reservoir, $19,000; stone abutment at river, $6,000, making a difference on these items of $50,000, and $54,000 on pipe, a total of $104,000 in favor of the Henderson system, which deducted from the total cost of the system $212,000 leaves $108,000 as the original cost approximately of the Owensboro system. But this is modified by the excess of 6-inch pipe in the Owensboro system over Henderson say of $8,000; and thus it is shown with reasonable certainty that the *cost* of the Owensboro system is approximately what Sturtevant put it at, namely, $111,840.

Mr. Weigal, after his examination of the Owensboro water works plant and making his calculation fixes the *present value of the plant at approximately $80,000.*

6. Mr. Cummings, a civil engineer of thirteen years actual experience in hydraulic work, educated for the profession in England, also made a particular examination of appellee's plant and property at Owensboro, with Sturtevant and Weigal. His figures are a little higher than the two preceding witnesses. He estimates the original cost of the plant at $119,981.25, that it

could be duplicated at present prices for labor and material for $124,500. He fixes the *present value of the plant and property at $87,250.*

7. Mr. Shifley, a civil engineer of fifteen years experience, accompanied the others, Sturtevant, Weigal and Cummings, in making the examination of the plant and property of the appellee. He estimates the original cost of the property at $115,000; that at present prices for labor and material the property could be duplicated for $114,230, and he estimates *the present value of the property at $84,320.*

(See Record, pp. 193, 220, 225 and 265.)

8. In addition to this evidence there is the evidence furnished by the appellee through its officers in reports made under the law of the state, Art. 3, Chap. 103, Ky. Stats., to the auditor for the years 1892 to 1878 inclusive. The reports are summarized in the following table;

Year ending September 15th.	Capital Stock, $100 Share.	Bonded Debt.	Other Debt.	Value of Tangible Property.	Gross Earnings.	Salaries and Wages.	Interest.	Dividend.	Enlarg't Plant.	Other Expenses.	Total Expenses.	Deficit.
1892	$355.000	$215.000	$21.139 07	$60.000	$22.565 77	.....	.....	.....	.....	.....	.....	.....
1893	355.000	215.000	21.031 39	75.000	26.328 50	.....	.....	.....	.....	.....	.....	.....
1894	355.000	219.000	26.058 53	75.000	27.776 14	.....	.....	.....	.....	.....	.....	.....
1895	355.000	241.000	5.448 94	75.000	29.124 80	.....	.....	.....	.....	.....	.....	.....
1896	355.000	239.000	5.890 55	75.000	28 267 49	$4.878 20	$14.859 87	.....	$2.493 00	$9.628 99	$31.860 06	$3.592 57
1897	355.000	238.000	.....	75.000	22.621 20	4.208 20	14.280 00	.....	125 72	10.275 08	28.889 00	6.267 80
1898	355.000	237.000	20.000 00	76.500	26.598 99	6.210 20	11.900 00	.....	.....	12.321 10	30.431 30	3.832 31

9. In the reports under the head of kind of tangible property, pipe system, pumping station, tools, hydrants, lot on which the pumping station is located, vacant lot corner McFarland and Triplett streets and about three acres of ground in Daviess county. Fair cash value of tangible property at the price it would bring at a fair valuation sale, $75,000. It was valued at that sum for the years 1893 to 1897; for the year 1892 at $60,000; and for the year 1898 at $76,500.

These reports were made for the purpose of enabling the "Board of Valuation and Assessment," at Frankfort, consisting of the auditor, treasurer and secretary of state to fix the value of the franchise of the appellee. The value of the tangible property under the law is deducted by this board and is assessed by the local assessors. There was, therefore, no motive for undervaluing the tangible property in these reports.

Several of the appellee's witnesses in their general lump statements put the value of this property at from $220,000 to $250,000. These statements cannot, we think, be satisfactory to the court. The valuation of the property made by persons entirely impartial, of skill and experience, without interest in the controversy, or motives to induce other than true statements, must be more satisfactory and reliable; and those persons fix the fair value of the appellee's plant and property at $77,000, $80,000, $84,000 and $87,250; that is, from seventy-seven to eighty-seven thousand dollars. The allegations of the appellant's answer that the fair value of the property was not greater or more than $90,000 is therefore sustained.

10. The next matter to be considered is that of the operating expenses. Mr. McGonigale, gives, over the protest of com-

plainant's counsel, on cross-examination items and amounts of such expense which he says are shown by the books of the company. He says the wages, salaries, etc., for the year ending June 30, 1900, were $4,130.72; taxes, $2,536.60; coal, $892.95 (for the preceding year $899.40). He does not distinctly say the taxes were all for the year in which paid. These items aggregate for the year $7,658.67. That the gross income for the year was $31,577.43. The wear and tear is placed by him at about three or four per cent.

It is probably a fair summary of his evidence to say that the annual gross income of the company is approximately $30,000, of which $7,400 is from the city for hydrant rentals, leaving $22,600 as the amount received from private consumers.

And Asa Williams, probably the fairest and best informed witness introduced by appellee, says (p. 146, q. 134) that he personally knows that the officers of the company made a calculation to ascertain the effect of the ordinance complained of, and found that the reduction would be about one-third from the rates charged by the company. Assuming that their calculation was approximately correct there is to be deducted from the gross income (less hydrant rentals) of $22,600, one-third or $7,500, thus leaving $15,100 as the net sum to be realized under the ordinance according to their estimate. From this deduct the items of operating expenses, including coal, $5,000, taxes, $2,500, wear and tear or repairs, $2,500, making $10,000, we have left $5,100. To this add $7,400 for hydrant rentals and we have a net income of $12,500, *or more than twelve per cent. on the fair value of the property employed in the public service; or, five or six per cent. on the exaggerated values given by some*

of the appellee's own witnesses. This is approximately the result on the appellee's own showing. The only material evidence on the question of the value of the property offered by the appellee is that of McGonigale and Williams, both employes of the company, and though there is perceptible some partiality, the facts they disclose strongly support the contention of the appellant.

It will be observed that the gross income given by the auditor, McGonigale, from the books of the company is considerably greater than that stated in the reports made to the state auditor for the purpose of enabling the state board to ascertain and assess the value of the franchise of the company.

The reports to the state auditor show that the expense of operations for the years 1896, 1897 and 1898 amounted to $15,296.60, or an average of $5,100 per annum.

The evidence of the witnesses for the city, Sturtevant, Weigal and others, show very satisfactorily that the ordinance rates are fair and reasonable. The contention of the city is that the rates by the ordinance would not reduce the income from consumers more than twenty-five per cent., and certainly not more than thirty per cent. That the increased consumption consequent upon lower prices would very soon result in a gross income as great or greater than the company now has from the exhorbitant rates under which it is now operating.

A reduction of rates does not necessarily, except perhaps for a very short period, result in any reduction of gross income. The contrary must be the immediate result, because as the commodity is cheapened, especially if the commodity be, as water is, a necessity, its consumption is increased, and consequently the income therefrom is also enlarged. Though it is doubtless

true that the expense of conducting the business, in this case the expense of operating the plant, is also increased, but such increase in expense is comparatively small. For example, if the water company has 1,200 "taps" or private consumers, and its income from these and other sources is $25,000, and its expense of operation $6,000, if the number of private consumers should be increased fifty per cent., or to 1,800, the increased expense of operation caused thereby would not probably exceed ten or twelve per cent, on the previous cost of operation, or say $600 or $800 per annum. The "house connections," so called, are always paid for by the property owners. If such an increase made an extension of the pipe system necessary, the cost thereof would be properly chargeable, not to the expense of operation but to the enlargement of the plant and consequently an enhancement of its value.

The evidence of Ames, Broeker and Bransford show that the rates charged by the water company for water are so excessive that the manufacturing establishments in the city cannot afford to use it; that they are prohibitory and that the water furnished for domestic use is not filtered or settled; that it is pumped directly from the river into the pipes and mains and delivered to consumers in the same condition as when taken from the river; that it is utterly unfit for domestic consumption when the water in the river is muddy, as all know it is three, four or five months of each year.

11. Little need be said as to the amount of the annual taxes. It appears that they range from $2,200 to $2,500 per annum.

12. The item of wear and tear or repairs is not as great as is contended by the appellee. The witnesses for the company put

it about four or five per cent. This estimate is probably approximately correct for the machinery. It amounts to little or nothing—probably not one per cent.—on the pipe system. On the *machinery* probably three to five per cent. and the pumping station with all the machinery connected with it cannot, it is believed, be fairly valued at more than $25,000 or $30,000. At all events, taking into consideration all the evidence, the fair conclusion is believed to be that $2,000 to $2,500 is an abundantly sufficient allowance for this item.

13. We take no account of the so-called bonds, amounting to $237,000, of the Owensboro Water Works Company, for two reasons, (1) they were issued as consideration for the attempted transfer of the Owensboro Water Company to the appellee of its franchises, and property, which transaction was utterly void. And, being void, it was and is incapable of ratification. And for the same reason, no estoppel can arise out of it. If either ratification or estoppel were allowed in such a case, then parties by indirect action would be enabled to do the very thing which the law prohibits from being done directly. See, 10 Wallace 684 and Jacksonville, &c., Railway v. Hooper, 160 U. S. 524. (2) There is no evidence in the record which even tends to show that any money ever realized from those bonds or any of them was ever paid into the corporation, or that the bonds were assets of the corporation. The bonds are not based upon any valid consideration, were issued in an illegal and prohibited transaction.

And as to the stock, which amounts to the enormous sum of $355,000, there is no evidence that it represents any money. To the extent only that it represents property or money actually and

legitimately expended for property which went into the corporation, it is not entitled to be considered.

The rates prescribed by the ordinance complained of, will yield income sufficient to defray legitimate operating expenses, wear and tear and taxes, and pay approximately twelve per cent. on the fair value of the property employed in the public service, and about five per cent. even on the extravagant valuation placed on it by the appellee.

14. It is contended by the appellee that under the ordinance the company is prohibited from collecting compensation for water furnished consumers in advance. The contention is based on section 3 of the ordinance which is as follows :

> "Sec. 3. That water rates may be collected by said persons, firms, companies and corporations from all consumers falling within the provisions of sections one and two of this ordinance who have water meters attached, monthly, quarterly or semi-annually, at the election of said persons, firms, companies or corporations furnishing the water, but water rates shall not be collected in advance except by voluntary consent of the consumer. * * *"

It is obvious that this section cannot be so construed. It relates entirely to collections for water service where a meter is attached. It has no reference to collections that may be made from consumers where a meter is not attached. Perhaps not one customer in twenty has a meter. Moreover, while the rates must be ascertained from a reading of the meter prescribed by a rule of the company, and rates collected accordingly, nothing

therein prevents the company from requiring security for the payment of the rates, either of money or by bond with good surety of course the company is at liberty to make any reasonable rule it chooses to adopt that does not conflict with the ordinance. There is certainly no just ground for appellee's contention on this point.

15. The purpose of section 6 was to require the company to keep accounts of its income and expenditures and report the same to the city authorities, so that they might be in possession hereafter of all such facts as were proper or necessary to be considered in adopting a schedule of reasonable rates for water service, just alike to the company and to the public. The city authorities had been unable to procure any statement from the company of its income or expenditures.

16. The courts will presume that the local authorities acted in good faith, that they were reasonably intelligent persons and knew they had no authority to prescribe rates that were unreasonable. For such rates would inevitably result in a tedious, expensive litigation and ultimate defeat, and thus, instead, of securing relief from onerous and unjust exactions, only loss and injury would result to the city and the community. To permit passion or prejudice or any other motive to influence them to fix inadequate rates would be unwise and unjust. Plain common sense, average intelligence and integrity would all dictate to the city authorities that they must, *at their peril*, be just and fair; that neither the state or federal courts would permit the enforcement of rates that were unjust, that if illegal rates were prescribed their work would be undone and no relief given to the community. There was therefore no motive for the city author-

ities to fix unjust rates, assuming that they were men of average intelligence. The charge is wholly unwarranted and unsupported by any fact appearing in this record. The question of motive is, immaterial. The question is whether the rates are just or not. If the rates are just they must stand though every man concerned in adopting them was actuated by a bad motive. If they are unjust, they must fall, though every councilman was moved by the purest and most patriotic purposes. Cooley on Torts, 2d Ed. p. 832; Soon Hing v. Crowley, 113 U. S. 710; Minnesota v. Barber, 136 U. S. 320; New Orleans v. Warner, 175 U. S. 145.

In Soon Hing v. Crowley, Justice Field in delivering the opinion of the court, said:

> "The principal objection, however, of the petitioner to the ordinance in question is founded upon the supposed hostile motives of the supervisors in passing it. The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the Emperor of China residents therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence there, and not for any sanitary, police, or other legitimate purposes. There is nothing, however, in the language of the ordinance, or in the record of the enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or infer-

able from their operation, considered with reference to the condition of the country and the existing legislation. The motives of the legislators, considered as the purpose they had in view, will always be presumed to be to accomplish that which follows as the natnral and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse characters of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned ; and of this there is no pretense."

The courts have said over and over that the judicial tribunals will indulge the presumption that the legislature or the tribunals to whom the power has been confided by the legislature to prescribe rates have not transcended their authority.

The burden therefore rests on the complainant to show to the court in the most satisfactory way possible under the circumstances, that its rights have been distinctly invaded. The doubts are to be resolved against the company. It cannot evade or avoid this duty to the court by coming with loose general allegations, carefully avoiding the vital facts, and when the answer traverses the bill and sets out those facts essential to a full investigation by the general reply, shift the burden upon the defendant to establish facts exclusively, or almost exclus-

ively, in the possession of the company. For example who knows except the appellee, the original cost of the entire property; its pumping station, its pump, its engines, boilers, its pipes, mains, meters, valves, etc., etc., down to the smallest piece? Who knows, except the appellee, its exact income and the sources of it from year to year? Who knows, except the company, the cost from year to year of operating the plant, its coal bills, salaries, wages, taxes, repairs, etc.? Certainly no one. And yet, this company, refusing to disclose these vitally important facts, is asking the court to prevent the enforcement of rates prescribed by the local authorities. No other inference can be drawn from such conduct than that full disclosures would be destructive of the company's case.

Chief Justice Waite in delivering the opinion of the court in Spring Valley Water Works Co. v. Schottler, 110 U. S. 353-4, said:

> "It is said, however, that appointing municipal officers to fix prices between the seller and the buyers is in effect appointing the buyers themselves, since the buyers elect the officers, and that this is a violation of the principle that no man shall be a judge in his own case. But the officers here selected are the governing board of the municipality, and they are to act in their official capacity as such a board when performing the duty which has been imposed upon them. Their general duty is, within the limit of their powers, to administer the local government, and in so doing to provide that all shall so conduct themselves, and so use their own property as not unnecessarily to injure others. They are elected by the people for that purpose; and whatever

is within the just scope of the purpose may properly be entrusted to them at the discretion of the legislature. That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn v. Illinois, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law."

And reference is here made to the language of Justice Harlan in San Diego Land Co. v. National City, 174 U. S. 754, already quoted on pp. 37-42 of this brief. And Judge Ross in the same case on the circuit (in 74 Fed. 83) says: "Undoubtedly every intendment is in favor of the rates as established by the municipal authorities."

"The court is bound to assume," said Judge Woolson, in Capital City Gas Light Co. v. Des Moines, 72 Fed. 840, "until the contrary is proven, that the council of the defendant city have acted with due regard to the rights of the plaintiff, and have established reasonable rates."

It has also been announced that if the rates adopted are of doubtful reasonableness or validity the matter should be left to the test of actual experiment.

In the case of Tilley v. Savannah, Florida & Western Railroad Company, 5 Fed. Rep. 662, Judge Woods said:

"The officers of the railroad company declare that the rates fixed by the commission will so reduce its income that it will not suffice to pay the running expenses of the road

and the interest on its bonded debt, leaving nothing for dividends to its stockholders. The railroad commissioners assert that their schedule was framed to produce 8 per cent. income on the value of the road after paying cost of maintenance and running expenses. Which view is the correct one, it is impossible to decide from the evidence submitted. There is, however, a conclusive way, and it seems to me it is the only one, by which this controversy can be settled, and that is by experiment. A reduction of railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right—the railroad company's officers or the railroad commission—in their view of the effect of the commission's tariff of rates, by allowing the tariff to go into operation."

And Judge Brewer in the case of the Chicago, Burlington & Quincy Railroad Company v. Dey and the other Railroad Commissioners, 38 Fed. Rep. 656–664, says on the latter page:

"Where the effect of the rates is doubtful, with a probability that they will prove compensatory, and the amount of business to be affected thereby is comparatively small, I think the courts may well wait for the test of experience. Influenced by these considerations, I am led to refuse the preliminary injunction, and to set aside the restraining order heretofore entered. It may well be that by the time this case comes to final hearing the test of experience will have solved some of these matters, and it may be clear—as now seems probable—that the rates imposed by this last schedule are compensatory within the rule laid down in the prior opinion, in which case no injunction ought to issue, or clear

that they are not compensatory, in which case, beyond any doubt in my mind, a final and permanent injunction ought to be granted. The preliminary injunction will be refused, and the restraining order will be set aside."

And in Pensacola & A. R. Co. v. Florida, 25 Fla. 310, 3 Lawyer's Repts. Ann. 661, 671, Chief Justice Raney uses this language:

"Where a tariff has been fixed by a commission it must be tested by experiment, unless it is shown or appears upon its face to be destructive of the railroad's interests. Neither the courts nor the railroad company can substitute its judgment for that of the commission where there is room for difference of intelligent opinion. A different rule from this would install a presumption that the commission neither knew their duty nor desired to do it. Like all officers, they will be presumed to know and do their duty until the contrary is shown."

If the rates prescribed by the ordinance complained of were of doubtful validity this course would have been peculiarly appropriate in present case. Certainly no great damage could have resulted in any event to the appellee. And the account of income and expenses of operation under the rates prescribed by the ordinance would have shown conclusively whether the contention of the appellee or of the city was correct, and would necessarily have furnished a basis for fixing just rates in the future.

We submit that by the best, the most valuable and satisfactory evidence, in the case, it appears conclusively that the present value of the appellee's property does not exceed about $90,000. That the total original cost of it from 1878 to the present time was not probably more than $115,000. That it could now be duplicated with entirely new material for approximately $115,000 to $120,000. That the water furnished is unfiltered and for more than one-third of the year unfit for domestic use; that the rates are excessively high, and for manufacturing establishments so exhorbitant as to be prohibitory; that the system is constructed on a cheap and insufficient plan; that because of no standpipes, no reservoirs, and the absence of large pipe in the system, the excess of small pipe, especially six-inch pipe, the fire protection is altogether insufficient. That the rates prescribed by the ordinance are shown beyond reasonable doubt to be just and fair to the company and to the public.

We contend that it is plain on the evidence, that the stock to the amount of more than $200,000 does not represent either money or property paid into or received by the corporation, and that the corporation received nothing from the bonds; that we see enough here, though much has been suppressed or withheld by appellee, to induce a belief that the organization of the appellee company has been as bad and as much open to judicial censure as that of the Cincinnati, Columbus & Hocking Valley Railway Co., 36 Fed. 54, 146, U. S. 630, 645. That the company has manifestly been for years and is now engaged in exacting from the public excessive and oppressive rates for the inadequate service rendered, to pay interest and principal on these unlawfully issued bonds.

We earnestly insist that this "excessive capitalization," represented by this enormous amount of stock and bonds, shall be excluded from all consideration in fixing rates and in the decision of the question of whether the rates prescribed by the ordinance are just; that instead, only the fair value of the property employed in the service shall be taken into account, considering the nature and value of the service rendered.

17. The ordinance of March 21, 1900, has two distinct objects in view; the regulation of rates to be paid for water delivered to private consumers; and the enforcement of a course of conduct on the part of the water company for the protection of the public health, by flushing the mains, etc. There is also a provision that the company shall keep an account of its income and expenses and make a report thereof to the common council. (See sections 5, 6, 8 of the ordinance, Record, pp. 34, 35.)

The provisions for flushing the mains at certain stated times is based upon sub-section 16 of section 3290, Ky. Stats., Charter of cities of the third class, which is as follows:

> "16. To make all police regulations to secure and protect the general health, comfort, convenience, morals and safety of the public; and to define, declare, prevent, suppress and remove nuisances either within the city or within one mile thereof."

When it is remembered that there is no standpipe, no reservoir and no filtration of the water delivered by the appellee to consumers by any mode, that the water is pumped directly from the Ohio river into the pipes and mains of the company and de-

livered in that condition, that mud and filth settles in the arms leading from the mains to the hydrants at the street intersections throughout the city the necessity for this provision is perfectly obvious.

The pipes leading from the mains to the hydrants at the street corners fill with mud and debris which decays and renders impure the water in the mains, making it unwholesome and unfit for domestic use, necessarily producing sickness, and no doubt, in many instances causing deaths.

Surely this provision is but a reasonable and proper police regulation. The court below, however, enjoined the enforcement of this provision along with every other part of the ordinance. So that now, no matter how muddy the water may be, or how filthy it may be, the city is enjoined from requiring the company to flush the mains and relieve them of the accumulations of mud and filth.

This court has in numerous cases upheld and enforced in the most vigorous terms the exercise of the police powers of the state and municipalities for the protection of the public health as well as the public morals and safety. It has declared that the legislative branch of the government cannot contract away its duties to protect the public health, morals and saftey: Stone v. Mississippi, 101 U. S. 819; Butchers Union v. Crescent City Co., 111 U. S. 750; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Barbier v. Connelly, 113 U. S. 31; Beer Co. v. Massachusetts, 97 U. S. 33; Fertilizing Co. v. Hyde Park, 97 U. S. 667; Railroad Co. v. Bristol, 151 U. S. 567; Chicago R. R. Co. v. Nebraska, 170, U. S. 58. See also, on the scope and extent of police powers, Commonwealth v. Alger, 7

Cush. 53; Thorpe v. Rutland R. R. Co., 27 Vermont 140; Cooley Const. Lim. 710, and Dillon Mun. Corp., secs. 141, 142.

The provision requiring accounts to be kept of the income of the company and the expenses of operation, etc., and reports to be made semi-annually thereof to the common council of the city, was intended to place before the city authorities such facts as would enable the common council to fix just and fair rates for water. Why should the city be enjoined from requiring the company to furnish this information to the common council? If the business of the company was strictly private, if the general public had no interest in it, it could with propriety be said, of course, that the city authorities had no right to require such disclosures. But that is not the case here. The business of supplying water to the inhabitants of the city by the company is one which affects every man, woman and child in the community. It is a business of vital interest to the public. The company is a *quasi* public corporation; it is a practical monopoly. The property of the company is "affected with a public interest;" and the company and its property is not *juris privati* only.

The company had refused on former occasions to furnish information of this character, information which was deemed valuable if not absolutely essential to prescribing just rates for water, and it was doubtless the purpose of the council while enacting the ordinance fixing the rates therein, to modify them, from year to year, either raising them or lowering them, as the information to be furnished might render just and proper.

The legislature of Kentucky, has in many instances, required such accounts and reports from turnpike companies for the purpose of obtaining information to enable it to fix rates, and the

common council was pursuing a policy adopted more than fifty years ago by the state in similar matters.

18. We have endeavored to show that the passage of the ordinance of March 20, 1900, was authorized by the laws of the state; that the rates fixed by the ordinance were, under the constitution and laws, just and reasonable, under the existing conditions. Not only that they were just rates, but, we submit that we have shown that they were liberal, enabling the company to pay all legitimate operating expenses and from ten to fourteen per cent. on the value of the property employed by the company in the public service. And this too when the water was unfiltered and for practically half of each year unfit for domestic use.

We further contend that if the court should differ from us as to the rates, still, the decree is erroneous in that it enjoins the city from enforcing the sanitary provisions of the ordinance and for that reason, if for no other, the decree of the circuit court should be reversed.

19. We respectfully submit the following summary of our conclusions:

1. The bill is insufficient; the allegations of it are vague and general many important facts essential to a correct decision of the case and necessarily within the knowledge of the complainant are omitted.

2. The evidence introduced by the appellee is general and of little value, consisting largely of opinions based not upon knowledge but upon information. While the evidence of the appellant goes into particulars, giving in full detail the kinds and quality of the property—an inventory of it—and stating the present value of the different parts, and the present value of

property as a whole. Estimates are also made of the original cost of the plant and property and the cost of the duplication at this time; also estimates of the cost of operation and amount of annual taxes and all expenses connected therewith.

3. The evidence introduced by the appellant shows that the prices fixed by the ordinance are, under all circumstances of this care, just and reasonable.

4. It conclusively appears from the evidence that the excessive capitalization is enormous; that a fair value of the property does not exceed $90,000.00; that the total cost of the plant did not exceed $125,000.00; while the stock of the company is $355,000.00, and its bonded indebtedness is $237,000.00.

5. That the service rendered by the company is bad and of little value; that the water is not filtered or otherwise clarified and purified; that it is for a great part of every year unfit for domestic use; that owing to the smallness of the pipes in the distribution system the supply of water is insufficient and does not for that reason afford adequate fire protection; that the prices charged by the company are exorbitant for both domestic and manufacturing purposes.

6. That the alleged assignment or sale or transfer of the franchises, contracts or property of the Owensboro Water Company to the appellee, the Owensboro Water Works Company, was without authority of law, contrary to public policy, ultra vires and void.

7. That under the various provisions of sec. 3290 Ky. Stats. especially sub-sections 5 and 16, there was ample authority conferred upon the common council to enact the ordinance of March 21, 1900. That by sub-section 5 the power is conferred to regu-

late the water service and to fix and regulate the price of the service. The water service is antecedent of the word "thereof;" that the mode in which the city might provide the service is not the substantive or primary thing, but the service is; the second sentence empowers the city to fix the price of the service; that it is obvious that if power is given to a municipal or *quasi* public corporation to render public service and nothing is said as to the prices that may be charged there is, nevertheless, by implication, power to charge a reasonable price for the service. In Stone v. Farmers Loan & Trust Co., 116 U. S. 329, it is said by Chief Justice Waite, in delivering the opinion of the court:

> "We return to the special provisions of the charter on which this case depends, and find, first, the authority given the corporation to carry persons and property. *This of itself, implies authority to charge a reasonable sum for the carriage.*"

That the second sentence of sub-section 5 cannot, therefore, reasonably be supposed to have reference to works which the city might erect for supplying water; that it would be anamolous to contend that the city might contract for supplying water which would necessarily involve consideration, that is, prices, and yet have by implication or otherwise power to modify such contract without the consent of other party.

(In the appendix will be found sections 3290, 3426 and 3438 Kentucky Statutes marked C.)

8. The decree of the circuit court is, it is respectfully sub-

mitted, erroneous, first, in enjoining the enforcement of the ordinance fixing the price of water; second, in enjoining the city from enforcing the sanitary provisions of the ordinance enacted for the protection of the public health.

Wherefore, the appellant respectfully prays the court to reverse the decree of the circuit court and direct the dismissal of the bill.

GEORGE W. JOLLY,

Attorney for Appellant

APPENDIX A.

GENERAL STATUTES, CHAPTER 56.

(Acts 1869-70, p. 94.)

Section 1. Any number of persons may associate themselves together and become incorporated for the transaction of any lawful business, except banking and insurance, and for the construction of railroads; but such incorporation shall confer no powers or privileges not possessed by natural persons, except as hereinafter provided.

Sec. 2. Among the powers of such bodies-corporate shall be the following:

1. To have perpetual succession.

2. To sue and be sued by the corporate name.

3. To have a common seal and alter the same at pleasure.

4. To render the shares or interests of stockholders transferable, and to prescribe the mode of making such transfers.

5. To exempt the private property of members from liability for corporate debts.

6. To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy.

7. To establish by-laws, and make all rules and regulations deemed expedient for tne management of their affairs, not inconsistent with the constitution or laws of this state or of the United States.

Sec. 3. Before commencing any business, except that of their own organization, they must adopt articles of incorporation, which shall be signed and acknowledged by them as deeds are required to be acknowledged, and recorded in a book kept for that purpose in the office of the clerk of the county court of the county where the principal place of business is to be.

Sec. 4. Corporations for the construction of any work of internal improvement shall, in addition, file a certified copy of such articles in the office of the secretary of state, and have the same recorded by him in a book kept for that purpose. Such articles of incorporation must specify the highest amount of indebtedness or liability, direct or contingent, to which the corporation is at any time to be subject, which must in no case exceed two-thirds of its capital stock.

Sec. 5. A notice shall be published for at least four weeks in some newspaper as convenient as practicable to the principal place of business; said notice shall specify:

1. The names of the corporators, the name of the corporation, and its principal place of transacting business.

2. The general nature of the business proposed to be transacted.

3. The amount of capital stock authorized, and the times when, and the conditions upon which it is to be paid in.

4. The time of the commencement and termination of the corporation.

5. By what officers or persons the affairs of the corporation are to be conducted, and the times at which they are to be elected.

6. The highest amount of indebtedness or liability to which the corporation is at any time to subject itself.

7. Whether private property is to be exempt from the corporate debts.

Sec. 6. The corporation may commence business as soon as the articles are filed for record in the office of the county court clerk, and their acts shall be valid if the publication in a newspaper is made, and the copy filed in the office of the secretary of state, when such filing is necessary, within three months from such filing in the clerk's office. No change in any of the foregoing particulars shall be valid, unless recorded and published as the original articles are required to be; nor shall any change be made at any time or in any manner, which would be inconsistent with the provisions of this act.

Sec. 7. Corporations for the construction of any work of internal improvement may be formed to endure for fifty years; those formed for other purposes shall not exceed twenty-five years in duration; but in either case they may be renewed from time to time for periods not greater than was at first permissible, if three-fourths of the votes cast at any regular election held for that purpose shall be in favor of such renewal. The articles of incorporation shall provide a mode by which a member may, at any time, withdraw from such incorporation, and also the mode of determining the amount to be received by such member upon withdrawal, and for the payment thereof, subject only to the rights of creditors of the corporation.

Sec. 8. The corporation shall not be dissolved prior to the period fixed upon in the articles of incorporation, except by a majority of the stock of its members, unless a different rule is adopted in the articles; and no such premature dissolution shall take place unless preceded by the newspaper publication required at its organization.

Sec. 9. Intentional fraud in failing or refusing to comply substantially with the articles of incorporation, shall be a misdemeanor, and, upon indictment and conviction in a court of competent jurisdiction, the party or parties so offending shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or imprisonment for not less than three months nor more than one year, or fine and imprisonment or both, at the discretion of the jury; and any person who has sustained injury from such fraud may also recover damages therefor against those guilty thereof.

Sec. 10. The intentional keeping of false books or accounts by any corporation, whereby any one is injured, shall be a misdemeanor on the part of those concerned therein, and they shall upon trial and conviction be fined in any sum not less than one hundred nor more than one thousand dollars.

Sec. 11. Transfers of stock shall not be valid, except as between the parties thereto, until the same is regularly entered upon the books of the company, so as to show the name of the person by whom and to whom the transfer is made, the numbers or other designation of the shares, and the date of the transfer. The books of the company shall be so kept as to show, intelligibly, the original stockholders, their respective interests, the amount which has been paid thereon, and all transfers thereof; and such books, or correct copies thereof, so far as they relate to the items mentioned in this section, shall be subject at all times to the inspection of any stockholder desiring the same.

Sec. 12. Any corporation organized, or attempted to be organized, in accordance with the provisions of this act, shall cease

to exist by a non-user of its franchise for five years at any one time; but such body shall not forfeit its franchises by reason of any omission to elect officers, or to hold meetings at any time prescribed by the by-laws.

Sec. 13. Corporations whose charters expire by their own limitation, or by the voluntary act of the stockholders, may, nevertheless, continue to act, for the purpose of closing up their business, but for no other purpose.

Sec. 14. Nothing herein shall exempt the stockholders of any corporation from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred by them, for the purpose of defrauding creditors; and an execution against the company may, to that extent, be levied upon the private property of such individual.

Sec. 15. For the purpose of making repairs, rebuilding or enlarging or extending works; or to meet contingencies or for the purpose of providing a sinking fund for the payment of debts, the corporation may establish a fund, and loan the same out, from time to time, taking, in all cases, good and sufficient security for the repayment of same.

Sec. 16. In any proceedings by or against a corporation, the court shall have the power to compel the officers of the corporation, on the motion of either party, upon proper cause being shown, to produce the books of the corporation, and when so produced, either party may use the same in evidence.

Sec. 17. Persons acting as a corporation under the provisions of this act, shall be presumed to be legally organized until the contrary is shown; and no such franchise shall be declared actually null or forfeited, except in a regular proceeding brought for that purpose.

Sec. 18. No person acting as a corporation under the provisions of this act, shall be permitted to set up or rely upon the want of legal organization, as a defense to action brought against them as a compromise; nor shall any person who may be sued on a contract made with such corporation, or sued for an injury done to its property, or for a wrong done to its interests, be permitted to rely upon such want of legal organization in his defense.

Sec. 19. For taking and certifying the acknowledgement of the articles of corporation, the clerk of the county court shall receive a fee of one dollar, and for recording the same he shall receive a fee of ten cents for each one hundred words, and the secretary of state shall receive a like fee for recording the same in his office.

Sec. 20. No company organized under the provisions of this act for the purpose of doing a mining or manufacturing business, shall have power to construct or operate any railroad, tramway, turnpike or canal, except such as may lead from its principal works or place of business to some navigable stream, or to some existing railroad, turnpike, or other public highway.

APPENDIX B.

GENERAL RESERVATION LAW.

(Acts 1855, page 15.)

Sec. 8. All charters and grants of or to corporations or amendments thereof, enacted or granted since the fourteenth of February, 1856, and all other statutes, shall be subject to

amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed no amendment or repeal shall impair other rights previously vested.

APPENDIX C.

(Kentucky Stats. Secs. 3290, 3426 and 3438.)

Sec. 3290. The common council of each of said cities shall, within the limitations of the constitution of the state and this act, have power by ordinance:

1. To levy and collect taxes upon all property, franchises and privileges taxable for state purposes.

2. To appropriate money and provide for the payment of the debts and expenses of the city.

3. To prevent the introduction of contagious diseases into the city, to make quarantine laws for the purpose, and enforce the same within ten miles of the city.

4. To establish and erect hospitals, alms-houses, city prisons, work-houses, make regulations for the government thereof, and to acquire and hold land for the purpose, either within or beyond the boundaries of the city.

5. To provide the city and the inhabitants thereof with water, light, power, heat and telephone service, by contract, or by works of its own, located either within or beyond the boundaries of the city. To make regulations for the management thereof, and to fix and regulate the prices to private consumers and customers.

6. To provide for the prevention and extinguishment of fires and to organize, establish and maintain fire companies.

7. To open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve, clean, sprinkle and keep in repair streets, alleys, lanes, avenues and sidewalks, or to have the same done; and to erect, establish, and keep in repair bridges, culverts, sewers, gutters and to provide for the erection of all buildings for the use of the city; and to make appropriations for same.

8. The common council may construct or reconstruct, maintain, alter, repair or change a system of sewers in such manner and at such time as the common council shall, by ordinance, declare, either by general taxation or at the cost of the property owners. The common council, may, by ordinance, construct, build, maintain, repair, alter or change a system of sewers at the cost of the property owners of said city; but if so constructed, the same shall be done as follows: The common council shall divide said city into districts of not less than three nor more than nine, and as nearly equal in area and population as possible; and not less than one district be sewered at one time. The cost of sewering an entire district shall be apportioned among the property owners of said district ratably, according to the superficial area of said property owners' holdings in said sewer district. The engineer of the said city shall make the estimate and apportionment of cost to each lot owner, and submit the same to the common council; and when said apportionment shall be received by said council, the amount found due by said engineer's report from each lot owner shall become a lien on the property of said property owner in said sewer dis-

trict, and shall became due and payable at once, and if not so paid, may be collected by petition in equity, filed in the circuit court of the county by the contractor performing said work for the city; and said court in equity is hereby empowered to enforce said lien and sell said property to satisfy said amount due for constructing sewerage; but the cost of sewering all intersections of streets shall be paid for by the city.

9. To license, tax and regulate the sale of spirituous, vinous and malt liquors in the city or within one mile thereof.

10. To license, tax and regulate hackney carriages, cars, omnibuses, wagons, drays and all other vehicles, and to fix the rate to be charged for the carriage of persons and property within the city, and to the public works and property of the city beyond the city limits.

11. To license, tax and regulate theatrical and other exhibitions, shows and amusements, either within the city or within one mile of the city limits, or to prohibit and suppress the same.

12. Each city shall raise a revenue from ad-valorem taxes and a poll tax and license fees, and to that end the common council of each city is hereby authorized and empowered to provide each year by ordinance for the assessment of all real and personal estate within the corporate limits thereof, subject to taxation for state purposes, and shall levy an ad-valorem tax on same, not exceeding the rate and limit prescribed in the constitution; and for school purposes, not exceeding fifty cents on each one hundred dollars of taxable property therein, or such portion of the poll tax or license fees as the council may designate; to levy a poll tax not exceeding one dollar and fifty cents on each adult male inhabitant thereof; and may impose license

fees on stock used for breeding purposes, on franchises, trades, occupations and professions, and provide for the collection thereof. All taxes and license fees shall be levied or imposed by ordinance, and the purpose or purposes for which the same are levied or imposed shall be specified therein, and the revenue therefrom shall be expended for no other purpose than that for which it is collected.

13. To prohibit and suppress all gambling houses, disorderly houses and bawdy houses, and the selling, displaying or exhibiting obscene pictures and literature.

14. To regulate, restrain or prevent the establishment or continuance in or near said city of any trade or occupation, business or manufactory offensive to the public or dangerous to health, or in causing or producing fire; and to regulate the sale of fire arms, and to prevent the carrying of concealed deadly weapons.

15. To regulate the storage of gunpowder, tar, pitch, rosin, saltpetre, gun-cotton, coal oil, lime and other combustible, explosive or inflamable material, and the use of lights, candles, lamps, furnaces, stoves, steam-pipes and other heating and lighting appliances in all sorts of buildings and places, and to regulate or suppress the use and sale of fire-crackers, fire-works and toy pistols.

16. To make all police regulations to secure and protect the general health, comfort, convenience, morals and safety of the public; and to define, declare, prevent, suppress and remove nuisances, either within the city or within one mile thereof.

17. To establish standard weights and measures to be used in the city.

18. To provide for the inspection and measuring of lumber and other building materials.

19. To provide for the inspection and weighing or measuring of stone, coal, wood and fuel, hay, corn and other grain and produce of all kinds.

20. To provide for and regulate the inspection of beef, pork, flour, meal and other provisions, oil, whiskey and other spirits.

21. To provide for and regulate the inspection of milk, butter, lard and other provisions; to regulate the vending of meat, poultry, fish, eggs, vegetables and fruits; to restrain and prevent the forestalling and regrating of provisions, and to establish and regulate markets and market-houses and places.

22. To impose fines, forfeitures and penalties, and terms of imprisonment for the violation of ordinances and by-laws, and to provide for their recovery and appropriation, and to provide for the seizure and destruction of all instruments of gaming.

23. To provide for the arrest, imprisonment and punishment of all rioters and disorderly persons by day or by night; and for the prevention, suppression and punishment of all riots and breaches of the peace, noise, disturbance or disorderly or unlawful assemblies, either within the city or within one mile of its limits.

24. To regulate or prohibit and prevent the erection of wooden buildings in such parts of said city as may be deemed proper, and to provide for the removal of the same at the cost of the owners, when erected or continued contrary to ordinance.

25. To regulate the construction of all buildings in the city, to prohibit and prevent the construction of unsafe buildings, or buildings without adequate means of escape in case of fire, and

to provide for the inspection of buildings and the construction of fire-escapes.

26. To impose penalties upon the owner, occupant or agent of any house, wall, sidewalk or other structure which may be considered dangerous or detrimental to the public, unless after due notice, to be fixed by ordinance, same to be removed or repaired; and to remove or repair same at owner's expense when suffered to remain contrary to ordinance.

27. To establish, license, tax and regulate all ferries across any river within the limits of said city, or bounding thereon, and to fix ferry rates.

28. To regulate, tax, license or suppress the keeping and going at large of all animals within the city, to impound the same, and in default of redemption pursuant to ordinance, to sell or kill same.

29. To provide for inclosing, improving and regulating all public grounds belonging to the city, in or out of the corporate limits.

30. To improve and preserve the navigation of any navigable river within or adjoining said city.

31. To erect, repair and regulate public wharves, docks and landings, and to fix the rate of wharfage.

32. To regulate the stationary anchorage and mooring of vessels or rafts.

33. To acquire, establish and maintain public cemeteries, parks, squares, avenues, promenades and fountains, either within or without the city; to make all necessary appropriations for the cost and maintenance of the same, and to make regulations for the government thereof.

34. To provide for the closing on election days all places where spirituous, vinous or malt liquors are sold.

35. To grant the right of way along, over or across the streets, alleys and public grounds of the city to any railway, street railway, gas, water, steam heating, telephone or electric light or power company for a term not exceeding twenty years. Before granting such franchise or privilege, such city shall first, after advertising same for a period of not less than thirty days, in some newspaper published in said city, receive bids therefor publicly, and award same to the highest and best bidder, having the right to reject any and all bids. Said city shall reserve the right to require such companies to conform to any change or altered grades of said streets and public grounds, to pay the cost of paving or otherwise improving between its rails and for reasonable distance on either side thereof, to make culverts beneath same for the free flow of water, and shall not be liable for any damage for delay in the operation of the business of any such company occasioned by any street improvement or repairs, or the constructing, bursting or repairing of any sewer or pipe in or across any street, alley or public ground, or injury by any mob or other violence; and shall reserve the right at any and all times to require a change of rails, or mode of construction or operation, to suit public convenience, and to require any pipes raised or lowered, and any wires taken down and laid underground, as the public good may require, and shall not be liable for the cost or damage occasioned by such changes, and shall reserve the right and power to regulate and control same and the streets, alleys and public way wherein they may be laid or constructed, as the public good may require. All such grants

shall expire and become void, notwithstanding a consideration, shall have been paid therefor, unless a *bona fide* organization shall have taken place and business been commenced and prosecuted thereunder in good faith, within one year from the date thereof. The council may impose other conditions and terms in addition to and not inconsistent with those enumerated herein. The provisions in this subsection as to advertisements and bids, and limiting the grant to twenty years shall not apply to the grant of the right of way to a trunk railway.

36. To establish a board of health, and to invest it with such powers and impose upon it such duties as may be deemed necessary.

37. To establish a board of sinking fund commissioners, and to invest it with such powers, and impose upon it such duties as may be deemed necessary. The board of sinking fund commissioners shall consist of the mayor and two other persons, not city officers, who shall have the same qualifications as councilmen, to be appointed by the mayor and confirmed by the common council, who shall hold their office for four years without compensation. Said commissioners shall make an annual report of their doings and transactions to the common council, and execute bond, to be approved by council, for the faithful discharge of their duties.

38. To provide for the appointment of a police force, and to fix annually, in the month of December, the number of same, and their salaries, which shall be uniform, except the chief of police may be paid more. In case the common council shall fail in the month of December of any year to fix the number and salaries of the police force, they shall remain for the ensuing year as previously fixed.

6668

39. To ascertain by survey, and mark and establish the boundaries and limits of said city, and all enlargements and additions thereof, and of the streets, alleys, lots and blocks thereon, and to make a map of same.

40. To carry out the full intent and meaning of this act and to accomplish the object of this incorporation.

Board of Public Works.

Sec. 3426. The common council of cities of the third class may, by ordinance, establish a board of public works, to consist of three freehold electors of said city, and who have been *bona fide* residents of the city so establishing said board of public works for two years next before their appointment. Said ordinance shall require the mayor of said city to appoint said board of public works in one month from the passage of the ordinance creating said board, and no two of said members of the board of public works shall be selected from the same ward. When no board of public works has been established, the duties herein imposed shall be performed by the common council, and such other employes and agents as said common council may elect or designate.

Sec. 3438. The board of public works shall have the exclusive power and control over the construction, supervision, cleaning, sprinkling, repairing, grading, and improving all streets, alleys, avenues, lanes, public cemeteries, parks, squares, fountains, wharves and landings, market-houses and places, bridges, sewers, drains, ditches, culverts, streams, canals and water-

courses, side-walks, curbing, and the lighting of all such public places may be deemed necessary within the corporation; to fix and establish grades of all streets, alleys, avenues and thoroughfares; they also have the power, supervision and control over the construction, repairing, cleaning, lighting and heating of all public buildings, and over all public improvements of the city. They shall have the exclusive power to make all improvements and expenditures, within the revenue limits allowed by the council which shall cost less than five hundred dollars, but shall let all contracts over fifty dollars to the lowest responsible bidder after due advertisement. The said board shall have the exclusive power to organize and control the fire department, the work-house, the hospital, the alms-house, the city prison, and such works as the city may own for supplying the city or the inhabitants thereof with water, light, heat or power.

Sec. 3256. This act shall be a public act, and be judicially noticed and liberally construed by the courts; and all previous charters of the cities embraced herein, and all amendments thereto are hereby repealed.